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CUMULATIVE SUPPLEMENT
TO
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1972 ANNOTATED

Issued September, 2012

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ENACTED THROUGH THE 2012 REGULAR SESSION
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User's Guide

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the Mississippi Code of 1972 Annotated, a User's Guide has been included in the main volume. This guide contains comments and information on the many features found within the Code intended to increase the usefulness of the Code to the user.



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PUBLISHER'S FOREWORD

Statutes

The 2012 Supplement to the Mississippi Code of 1972 Annotated reflects the statute law of Mississippi as amended by the Mississippi Legislature through the end of the 2012 Regular Session.

Annotations

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals and decisions of the appropriate federal courts. These cases will be printed in the following reporters:

- Southern Reporter, 3rd Series
- United States Supreme Court Reports
- Supreme Court Reporter
- United States Supreme Court Reports, Lawyers' Edition, 2nd Series
- Federal Reporter, 3rd Series
- Federal Supplement, 2nd Series
- Federal Rules Decisions
- Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

- American Law Reports, 6th Series
- American Law Reports, Federal Series
- Mississippi College Law Review
- Mississippi Law Journal

Finally, published opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

Amendment Notes

Amendment notes detail how the new legislation affects existing sections.

Editor's Notes

Editor's notes summarize subject matter and legislative history of repealed sections, provide information as to portions of legislative acts that have not been codified, or explain other pertinent information.

PUBLISHER'S FOREWORD

Joint Legislative Committee Notes

Joint Legislative Committee notes explain codification decisions and corrections of Code errors made by the Mississippi Joint Legislative Committee on Compilation, Revision, and Publication of Legislation.

Tables

The Statutory Tables volume adds tables showing disposition of legislative acts through the 2012 Regular Session.

Index

The comprehensive Index to the Mississippi Code of 1972 Annotated is replaced annually, and we welcome customer suggestions. The foreword to the Index explains our indexing principles, suggests guidelines for successful index research, and provides methods for contacting indexers.

Acknowledgements

The publisher wishes to acknowledge the cooperation and assistance rendered by the Mississippi Joint Legislative Committee on Compilation, Revision, and Publication of Legislation, as well as the offices of the Attorney General and Secretary of State, in the preparation of this supplement.

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September 2012

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SCHEDULE OF NEW SECTIONS

Added in this Supplement

TITLE 97. CRIMES

CHAPTER 3. Crimes Against the Person

- SEC.
97-3-52. Prohibition against selling, buying, offering to sell and offering to buy child or unborn child; penalties.
97-3-54.1. Anti-Human Trafficking Act; prohibited conduct; penalty.

CHAPTER 5. Offenses Affecting Children

- 97-5-49. Knowingly allowing party where minor obtains, possesses or consumes alcoholic beverage; definitions; applicability of section; penalties.
97-5-51. Mandatory reporting of sex crimes against minors; definitions; procedure; report contents; forensic samples; penalties.

CHAPTER 9. Offenses Affecting Administration of Justice

ARTICLE 3. OBSTRUCTION OF JUSTICE

- 97-9-116. Bribing a judge.

CHAPTER 15. Offenses Affecting Highways, Ferries and Waterways

- 97-15-32. Dumping of dead wildlife, wildlife parts or waste in or on highways, private property, lakes, navigable waters, etc.; penalties.

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97-17-71.2. Scrap metal dealers prohibited from paying cash or making payment of any kind at time of transaction for air conditioner evaporator coil or condenser; scrap metal dealers permitted to purchase air conditioner evaporator coil or condenser only from certain contractors or companies; payment for scrap metal to be made by check or money order and mailed to business address of company for whom metal being sold; penalties for violations.

CHAPTER 21. Forgery and Counterfeiting

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SCHEDULE OF NEW SECTIONS

CHAPTER 23. Offenses Affecting Trade, Business and Professions

- SEC.
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CHAPTER 37. Weapons and Explosives

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HONESTY IN PURCHASING FIREARMS ACT

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97-37-105. Crime of soliciting, persuading, encouraging or enticing illegal sale of firearms or ammunition; crime of providing false information to licensed dealer or private seller of firearms or ammunition.

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CHAPTER 1

Conspiracy, Accessories and Attempts

SEC.

97-1-1.	Conspiracy.
97-1-5.	Accessories after the fact; punishment.

§ 97-1-1. Conspiracy.

- (1) If two (2) or more persons conspire either:
 - (a) To commit a crime; or
 - (b) Falsely and maliciously to indict another for a crime, or to procure to be complained of or arrested for a crime; or
 - (c) Falsely to institute or maintain an action or suit of any kind; or

(d) To cheat and defraud another out of property by any means which are in themselves criminal, or which, if executed, would amount to a cheat, or to obtain money or any other property or thing by false pretense; or

(e) To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use of employment thereof; or

(f) To commit any act injurious to the public health, to public morals, trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws; or

(g) To overthrow or violate the laws of this state through force, violence, threats, intimidation, or otherwise; or

(h) To accomplish any unlawful purpose, or a lawful purpose by any unlawful means; such persons, and each of them, shall be guilty of a felony and upon conviction may be punished by a fine of not more than Five Thousand Dollars (\$5,000.00) or by imprisonment for not more than five (5) years, or by both.

(2) Where one (1) or more of the conspirators is a law enforcement officer engaged in the performance of official duty or a person acting at the direction of a law enforcement officer in the performance of official duty, any remaining conspirator may be charged under this section if the alleged conspirator acted voluntarily and willfully and was not entrapped by the law enforcement officer or person acting at the direction of a law enforcement officer.

(3) Where the crime conspired to be committed is capital murder or murder as defined by law or is a violation of Section 41-29-139(b)(1), Section 41-29-139(c)(2)(D) or Section 41-29-313(1), being provisions of the Uniform Controlled Substances Law, the offense shall be punishable by a fine of not more than Five Hundred Thousand Dollars (\$500,000.00) or by imprisonment for not more than twenty (20) years, or by both.

(4) Where the crime conspired to be committed is a misdemeanor, then upon conviction said crime shall be punished as a misdemeanor as provided by law.

SOURCES: Codes, 1892, § 1006; 1906, § 1084; Hemingway's 1917, § 810; 1930, § 830; 1942, § 2056; Laws, 1954, Ex. ch. 20; Laws, 1968, ch. 343, § 1; Laws, 1981, ch. 488, § 1; Laws, 2007, ch. 500, § 1, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment added (2) and redesignated the former first paragraph as present (1) and the former second and third paragraphs as present (3) and (4); deleted "Provided that" from the beginning of (3) and (4); inserted "or Section 41-29-313(1)" in (3); and made a minor stylistic change.

Cross References — Statute of limitation for prosecution for conspiracy, see § 99-1-5.

JUDICIAL DECISIONS

- 8. Indictment.
- 9. Evidence.
- 10. —Admissibility.
- 14. — Sufficiency.
- 14.5. — Sufficiency; conspiracy.
- 19. Sentencing.

8. Indictment.

Indictment charging defendant conspiracy to possess precursors was not insufficient for failing to include the language “with the intent to unlawfully manufacture a controlled substance” because the crime of conspiracy and the crime of possession of precursors were inherently different and the crime of conspiracy did not merge with the crime of possession of precursors. While the State was required to inform a defendant of the underlying crime to which he conspired, the State did not have to prove every element of the underlying crime in order to prevail on a conspiracy charge; therefore, the indictment did not have to include language that defendant possessed precursors with the intent to manufacture a controlled substance or with knowledge that the precursor chemicals would be used to unlawfully manufacture a controlled substance. *Berry v. State*, 996 So. 2d 782 (Miss. 2008).

Count I of the indictment charged defendant with conspiring to possess precursor chemicals which were not named or otherwise identified, but it did not charge him with conspiring to possess those unidentified precursors with either the intent to manufacture a controlled substance or with knowledge, or under circumstances where he reasonably should have known, that the precursor chemicals would be used to unlawfully manufacture a controlled substance, and thus the wording used in Count I failed to place defendant on notice as to whether he was being charged with conspiring to commit the crime specified in either Miss. Code Ann. § 41-29-313(1)(a)(i), (1)(a)(ii), or (2)(c)(i); therefore, Count I of the indictment was defective because it failed to allege a crime, and the appellate court had to reverse and render defendant’s conviction in Count I. *Berry v. State*, 996 So. 2d

793 (Miss. Ct. App. 2007), reversed by 996 So. 2d 782, 2008 Miss. LEXIS 604 (Miss. 2008).

9. Evidence.**10. —Admissibility.**

Defendant’s convictions for capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e), aggravated assault in violation of Miss. Code Ann. § 97-3-7(2), and conspiracy to commit aggravated assault were appropriate because the victim’s autopsy photographs were admissible since their probative value was not outweighed by any danger of undue prejudice and since there was a meaningful evidentiary purpose. *Williams v. State*, 3 So. 3d 105 (Miss. 2009).

14. — Sufficiency.

Sufficient circumstantial evidence supported defendant’s conviction for conspiracy to distribute under Miss. Code Ann. §§ 97-1-1 (Supp. 2010) and 41-29-139 (Rev. 2009) as the evidence showed that a witness had purchased marijuana at defendant’s house, that a large quantity of it was found in multiple locations throughout the house, that the house smelled strongly of it, and that digital scales and packaging materials were also found. Further, defendant admitted that the marijuana belonged to him. *Jackson v. State*, 73 So. 3d 1176 (Miss. Ct. App. 2011), writ of certiorari denied by 73 So. 3d 1168, 2011 Miss. LEXIS 523 (Miss. 2011).

Verdict finding defendant guilty of selling cocaine in violation of Miss. Code Ann. § 41-29-139(a)(1) and conspiracy to sell cocaine in violation of Miss. Code Ann. § 97-1-1(a)(1) was not against the overwhelming weight of the evidence as there was testimony from several witnesses, including an accomplice, a narcotics agent, and a police officer, that defendant was involved in the drug sale. In addition, the jury was permitted to watch a video showing defendant’s physical behavior during the drug sale negotiations in which defendant was shown talking to the accomplice with his hand over his mouth as the accomplice negotiated with an informant about the price of the cocaine. *Foriest v. State*, 4 So. 3d 385 (Miss. Ct. App. 2009).

Evidence was sufficient to sustain a conviction for conspiracy to commit armed robbery because defendant disguised himself as a woman, entered the bank with his co-defendants, and shuffled around nervously as another defendant attempted to hold up the teller with a handgun, all the while shielding his face from view. Thereafter, defendant was caught attempting to escape from the abandoned safe house and he was still wearing the same women's skirt that he wore during the attempted robbery. *Glenn v. State*, 996 So. 2d 148 (Miss. Ct. App. 2008).

There was sufficient evidence to uphold a conviction for conspiracy to commit armed robbery under Miss. Code Ann. § 97-1-1 where the evidence showed that defendant was in a casino with the other perpetrators, he stood behind one of them as a robbery took place, he ran out with them, and he received a portion of stolen money. *Quawrells v. State*, 938 So. 2d 370 (Miss. Ct. App. 2006).

14.5. — Sufficiency; conspiracy.

Defendant's conviction for conspiracy under Miss. Code Ann. § 97-1-1(i) was proper because there was direct evidence that defendant and two others walked into the store, while one served as lookout, one took beer, and the other took money. The three argued over who had whose back while robbing the store and later, the three divided the money. *Taylor v. State*, 62 So. 3d 962 (Miss. 2011).

Evidence was sufficient to support defendant's conviction, pursuant to Miss. Code Ann. § 97-1-1(1)(a), for conspiracy to bring a controlled substance into a jail; defendant's letters to his girlfriend clearly indicated such a conspiracy and showed that the girlfriend was trying to comply with defendant's request for the contraband. *Green v. State*, 25 So. 3d 1086 (Miss. Ct. App. 2010).

Evidence, including the testimony of defendant's co-conspirator and other witnesses, as well as written statement by defendant and physical evidence, was sufficient to support defendant's conviction of conspiracy to sell a controlled substance, in violation of Miss. Code Ann. § 97-1-1. *Anderson v. State*, 23 So. 3d 1087 (Miss. Ct. App. 2009).

Defendant's convictions for uttering a forgery under Miss. Code Ann. § 97-21-1 and for conspiracy under Miss. Code Ann. § 97-1-1 were affirmed because there was sufficient evidence for the jury to find that defendant possessed the forged checks and attempted to pass these checks off as true and although the co-conspirator was an admitted drug addict, his testimony was not self-contradictory or thoroughly impeached. *Nelson v. State*, 32 So. 3d 534 (Miss. Ct. App. 2009), writ of certiorari denied by 31 So. 3d 1217, 2010 Miss. LEXIS 186 (Miss. 2010).

Evidence was sufficient that defendant possessed and conspired to possess illegal amounts of pseudoephedrine intending to use them in an unlawful manner in violation of Miss. Code Ann. 97-1-1(a) because his passenger had an illegal amount of pseudoephedrine, and defendant admitted that he drove her to purchase pills to sell for the eventual manufacture of methamphetamine. *Gales v. State*, 29 So. 3d 65 (Miss. Ct. App. 2009).

Defendant's conviction for conspiracy to commit capital murder was proper pursuant to Miss. Code Ann. § 97-1-1(1)(a) because a witness testified that he scouted the victims' property, arranged a meeting between defendant and another individual, and participated with that individual in an attempt to murder the victims. *Vickers v. State*, 994 So. 2d 200 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 675 (Miss. 2008).

Because there was sufficient evidence to support a conviction on the conspiracy to possess marijuana with intent to sell more than five kilograms of marijuana, the necessary nexus existed to link defendant to the possession of the 25 pounds of marijuana bricks found in the co-conspirator's vehicle; thus, there was sufficient evidence to support her conviction for possession of more than five kilograms of marijuana. *Williams v. State*, 984 So. 2d 989 (Miss. Ct. App. 2007), writ of certiorari dismissed by 2008 Miss. LEXIS 332 (Miss. June 26, 2008).

Evidence was sufficient to convict defendant of conspiracy to possess marijuana with intent to sell more than five kilograms of marijuana under Miss. Code

Ann. § 97-1-1(a) because a co-conspirator's vehicle contained more than 25 pounds of marijuana, the mere amount of marijuana was sufficient to support a charge of possession with intent to transfer, sell, or distribute more than five kilograms of marijuana, and defendant blocked a deputy's attempt to pull over a co-conspirator's vehicle. *Williams v. State*, 984 So. 2d 989 (Miss. Ct. App. 2007), writ of certiorari dismissed by 2008 Miss. LEXIS 332 (Miss. June 26, 2008).

Evidence was sufficient to convict defendant of conspiracy where witness testimony indicated that defendant and another person formed a union of the minds intent on selling cocaine to the agent, and defendant's conduct amounted to circumstantial evidence of an agreement with the other person to sell cocaine. *Dear v. State*, 960 So. 2d 542 (Miss. Ct. App. 2006), writ of certiorari denied en banc by

959 So. 2d 1051, 2007 Miss. LEXIS 396 (Miss. 2007).

19. Sentencing.

In a case where defendant was convicted of several crimes relating to the arson and burglary of a residence, his double jeopardy rights were not violated due to the fact that some of the elements of the crimes overlapped; each of the crimes involved required proof of an additional fact that the other did not. *McCollins v. State*, 952 So. 2d 305 (Miss. Ct. App. 2007).

Trial court did not err by imposing sentences of five years for conspiracy, 25 years for burglary of a dwelling, five years for grand larceny, and 20 years for first degree arson, as these were all the maximum sentences allowed for these crimes. *McCollins v. State*, 952 So. 2d 305 (Miss. Ct. App. 2007).

§ 97-1-3. Accessories before the fact.

JUDICIAL DECISIONS

3. Participation.
5. Evidence.
6. Instructions.

3. Participation.

If the jury believed all of the testimony offered by the first witness, including defendant's confession to which she testified, then there was sufficient evidence to support a finding that defendant was the principal in the robbery and murder of the victim; if the jury chose to disregard the confession and believe only the testimony of the second witness regarding the bloody clothes and the testimony of the first witness regarding what she overheard about the planning of the crime, then the evidence was sufficient to support an accomplice jury instruction and defendant's conviction for capital murder as a principal under Miss. Code Ann. § 97-1-3. *Johnson v. State*, 956 So. 2d 358 (Miss. Ct. App. 2007).

5. Evidence.

Evidence was sufficient to establish defendant's guilt of conspiracy because the evidence showed that defendant — know-

ing of the plan to rob the bank — drove the co-defendant's to the bank, waited for them outside, and then served as the getaway driver. *Glenn v. State*, 996 So. 2d 148 (Miss. Ct. App. 2008).

6. Instructions.

At defendant's trial for capital murder during the commission of a robbery, defendant was not entitled to a lesser-offense instruction of accessory-after-the-fact; the proposed instruction lacked an evidentiary basis. Defendant said that he became uncomfortable about the incident only later that evening, but remained unaware that any felony had been committed; therefore, he could not be an accessory under Miss. Code Ann. § 97-1-3. *Dampier v. State*, 973 So. 2d 221 (Miss. 2008).

Three defendants' capital-murder convictions were appropriate because, although a limiting instruction given to the jury regarding confessions by defendants was not sufficient, no prejudice or manifest injustice resulted as to any defendant; each of the defendants gave sufficient evidence of his individual participation in

the robbery of a gun store in his separate statements to support a capital-murder charge. *Anderson v. State*, 5 So. 3d 1088 (Miss. Ct. App. 2007), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 171 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 184 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 177 (Miss. 2009).

Language of Miss. Code Ann. § 97-1-3, as well as the holdings of the appellate court and the supreme court interpreting and applying that provision, provide suf-

ficient notice to felony defendants that although they may be indicted as a principal, a jury instruction based on accomplice liability is proper provided that the evidence presented supports the instruction given; thus, defendant could not claim prejudice by a jury instruction that properly instructed the jury in accordance with Miss. Code Ann. § 97-1-3 simply because the indictment did not contain any allegations regarding accomplice liability. *Johnson v. State*, 956 So. 2d 358 (Miss. Ct. App. 2007).

§ 97-1-5. Accessories after the fact; punishment.

(1) Every person who shall be convicted of having concealed, received, or relieved any felon, or having aided or assisted any felon, knowing that the person had committed a felony, with intent to enable the felon to escape or to avoid arrest, trial, conviction or punishment after the commission of the felony, on conviction thereof shall be imprisoned in the custody of the Department of Corrections as follows:

(a) If the felony was a violent crime:

(i) If the maximum punishment was life, death or twenty (20) years or more, for a period not to exceed twenty (20) years; or

(ii) If the maximum punishment for the violent felony was less than twenty (20) years, for a period not to exceed the maximum punishment.

(b) If the felony was a nonviolent crime:

(i) If the maximum punishment for the nonviolent felony was ten (10) years or more, for a period not to exceed ten (10) years; or

(ii) If the maximum punishment for the nonviolent felony was less than ten (10) years, for a period not to exceed the maximum punishment.

(2) For the purposes of this section, “violent crime” means homicide, robbery, manslaughter, sex crimes, burglary of an occupied dwelling, aggravated assault, kidnapping, drive-by shooting, armed robbery, felonious abuse of a vulnerable person, felonies subject to an enhanced penalty, felony child abuse or exploitation, or any violation of Section 97-5-33 relating to exploitation of children, Section 97-5-39(1)(b), 97-5-39(1)(c) or 97-5-39(2) relating to child neglect or abuse, or Section 63-11-30(5) relating to aggravated DUI.

(3) In the prosecution of an offense under this section, it shall not be necessary to aver in the indictment or to prove on the trial that the principal has been convicted or tried.

SOURCES: Codes, *Hutchinson’s* 1848, ch. 64, art. 12, Title 8 (7); 1857, ch. 64, art. 3; 1871, § 2485; 1880, § 2699; 1892, § 951; 1906, § 1027; *Hemingway’s* 1917, § 752; 1930, § 770; 1942, § 1996; Laws, 2012, ch. 496, § 1, eff from and after passage (approved April 30, 2012.)

Amendment Notes — The 2012 amendment added “custody of the Department of Corrections as follows:” at the end of (1); added (1)(a) and (2); added “of an offense under this section” following “prosecution” at the beginning of (3).

JUDICIAL DECISIONS

1. In general.
2. Evidence; generally.
3. —Sufficiency.
4. Instructions.

1. In general.

By defendant’s own admission, corroborated by testimony, defendant was a principal to the crime of murder and thus he could not have been at the same time an accessory after the fact under Miss. Code Ann. § 97-1-5 and defendant was not entitled to an instruction on such. *Williams v. State*, 994 So. 2d 808 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

Attorney’s disbarment was appropriate pursuant to Miss. R. Disc. St. Bar 6 because the attorney had pled guilty to the crime of accessory after the fact in violation of Miss. Code Ann. § 97-1-5 and she had been ordered to voluntarily surrender her license to practice law; all procedural prerequisites had been met and disbarment was required. *Miss. Bar v. Smith-Miller*, 962 So. 2d 545 (Miss. 2007).

2. Evidence; generally.

3. —Sufficiency.

Defendant’s conviction for being an accessory after the fact to her husband’s crime of statutory rape by assisting her daughter in obtaining an abortion was appropriate because defendant had concealed, received, relieved, aided, or assisted her husband and those actions were sufficient under Miss. Code Ann. § 97-1-5 to support the conviction. *Sherron v. State*, 959 So. 2d 30 (Miss. Ct. App. 2006),

writ of certiorari denied by 958 So. 2d 1232, 2007 Miss. LEXIS 375 (Miss. 2007).

4. Instructions.

Trial judge did not err in denying defendant’s request for lesser offense instructions on accessory after the fact and/or receiving stolen goods, Miss. Code Ann. §§ 97-17-70 and 97-1-5, as these lesser offenses were separate and distinct from those charged, and there was no evidentiary basis to support the requisite knowledge element for either instruction. *Brazzle v. State*, 13 So. 3d 810 (Miss. 2009).

Trial court did not err by refusing to give defendant’s requested accessory-after-the-fact jury instruction because considering the evidence in the light most favorable to defendant, a reasonable jury could not have found defendant guilty as an accessory after the fact. There was no evidence that defendant acted with the intent to enable the man with the crooked eye to escape or avoid arrest, trial, conviction, or punishment for the victim’s murder. *Brown v. State*, 19 So. 3d 85 (Miss. Ct. App. 2008), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 489 (Miss. 2009).

At defendant’s trial for capital murder during the commission of a robbery, defendant was not entitled to a lesser-offense instruction of accessory-after-the-fact under Miss. Code Ann. § 97-1-5. The proposed instruction lacked an evidentiary basis; defendant said that he became uncomfortable about the incident only later that evening, but remained unaware that any felony had been committed. *Dampier v. State*, 973 So. 2d 221 (Miss. 2008).

§ 97-1-6. Directing or causing felony to be committed by person under age of seventeen years.

JUDICIAL DECISIONS

2. Evidence insufficient to sustain a conviction.

Miss. Code Ann. § 97-1-6 pertains to persons over the age of seventeen and not persons who are seventeen at the time a crime is committed. Therefore, a conviction for directing or causing a minor to commit a felony was based on insufficient evidence because appellant was only 17

when a crime was committed; moreover, the jury instructions failed to include the necessary language that appellant be over seventeen at the time of the crime. *Armstead v. State*, 80 So. 3d 112 (Miss. Ct. App. 2011), writ of certiorari denied en banc by 80 So. 3d 111, 2012 Miss. LEXIS 77 (Miss. 2012).

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of 18 U.S.C.S. 373, Proscribing So-

licitation to Commit Crime of Violence. 49 A.L.R. Fed 2d 333.

§ 97-1-7. Attempt to commit offense; punishment.

Cross References — Mandatory reporting of offense under this section relating to the attempt to commit any of the offenses listed in § 97-5-51(1) when committed by an adult against a minor under the age of sixteen, see § 97-5-51.

JUDICIAL DECISIONS

2. Indictment.
3. Particular offenses.
4. —Burglary.
8. —Sexual offenses.
10. — Miscellaneous.
11. Sentence.

2. Indictment.

Indictment was not defective for failing to include the third element of attempted burglary: the failure to consummate its commission. The use of the word “attempt” gave defendant sufficient notice that the State would prove that the crime was not successfully committed. *Spearman v. State*, — So. 3d —, 2010 Miss. App. LEXIS 107 (Miss. Ct. App. Mar. 2, 2010), reversed by, remanded by 58 So. 3d 30, 2011 Miss. App. LEXIS 277 (Miss. Ct. App. 2011).

Indictment was not defective for failing to include the third element of attempted burglary: the failure to consummate its commission. The use of the word “attempt” gave defendant sufficient notice

that the State would prove that the crime was not successfully committed. *Spearman v. State*, — So. 3d —, 2010 Miss. App. LEXIS 107 (Miss. Ct. App. Mar. 2, 2010), reversed by, remanded by 58 So. 3d 30, 2011 Miss. App. LEXIS 277 (Miss. Ct. App. 2011).

Indictment for aggravated assault, Miss. Code Ann. § 97-3-7 (Rev. 2006), was not fatally defective because it did not need to specify an overt act of attempt where defendant was not indicted under the general attempt statute, Miss. Code Ann. § 97-1-7 (Rev. 2006). Thus, the previous decision in *Joshua v. State*, 445 So. 2d 221 (Miss. 1984), which held that the separate elements of attempt had to be set out in a criminal indictment for aggravated assault, was expressly overruled. *Brooks v. State*, 18 So. 3d 833 (Miss. 2009).

Indictment against defendant described the charge of attempted burglary by citing the burglary statute, providing the details of the alleged attempted burglary, and

supplying the details concerning the failure to complete the burglary; thus, the indictment against defendant stated the essential facts, and fully notified him of the nature and cause of the charges brought against him, and therefore the trial court did not err in denying the motion to quash the indictment. *Brown v. State*, 961 So. 2d 720 (Miss. Ct. App. 2007).

Defendant was originally indicted for attempted breaking and entering, but the indictment was properly amended when the amendment was one of form, not substance, and defendant had notice, and the indictment never made reference to Miss. Code Ann. § 97-1-7; had the original indictment stated “Attempted Burglary, Miss. Code Ann. § 97-1-7” or failed to provide “Burglary of a Dwelling, Miss. Code Ann. § 97-17-23,” then unquestionably the amendment would have been one of substance rather than form, and the supreme court would have been compelled to reverse the trial court’s conviction and sentence. This indictment, however, was styled and read “Burglary of a Dwelling, Miss. Code Ann. § 97-17-23.” *Spears v. State*, 942 So. 2d 772 (Miss. 2006).

Because the information did not sufficiently charge defendant with armed robbery, as it did not charge the overt act as the display of a weapon by another perpetrator and then the shooting of the victim, defendant’s armed robbery conviction, the result of a guilty plea, was reversed; however, because there was a sufficient charge of simple robbery, if not for the word “attempt,” the court affirmed a conviction of robbery, and remanded for sentencing on that count. *Neal v. State*, 936 So. 2d 463 (Miss. Ct. App. 2006).

3. Particular offenses.

4. —Burglary.

Evidence was sufficient to support a guilty verdict for attempted burglary because, *inter alia*: (1) the victim testified that she heard someone removing the screen from her bedroom window and breathing heavily; (2) once the scene was investigated by the victim and the officers, the screen was found removed from the window; and (3) the victim testified to having seen defendant in her backyard

shortly after hearing the window screen tampering; thus, the trial court did not err in denying defendant’s motion for a directed verdict, his request for a peremptory jury instruction, and his motion for a judgment notwithstanding the verdict. *Brown v. State*, 961 So. 2d 720 (Miss. Ct. App. 2007).

8. —Sexual offenses.

Evidence was sufficient to convict defendant of attempted sexual battery pursuant to Miss. Code Ann. § 97-1-7 and Miss. Code Ann. § 97-3-95(1)(a) and (d) because, *inter alia*: (1) there was evidence that defendant intended to penetrate the six-year-old victim’s privates with his privates, which satisfied the definition of penetration under Miss. Code Ann. § 97-3-97(a); and (2) at the time of the incident, defendant, who was 18, was more than two years older than the victim. *Bracken v. State*, 939 So. 2d 826 (Miss. Ct. App. 2006).

10. — Miscellaneous.

Trial judge’s decision that a photograph’s content was not too remote in time to be relevant and that the danger of unfair prejudice did not substantially outweigh that probative value was not an abuse of discretion because it was within the trial judge’s discretion to determine that the photograph of handcuffs in defendant’s car was relevant, even though it was taken more than two months after the alleged attempted kidnapping; the presence of the handcuffs in defendant’s car was offered to show that on his trips to “look for women,” defendant was not looking for consensual relationships, and the presence of handcuffs made it more probable that defendant grabbed the victim with the intent to kidnap her. *Tucker v. State*, 64 So. 3d 594 (Miss. Ct. App. 2011).

Defendant’s conviction for aggravated assault was appropriate even though there was no direct proof that defendant intended to cause serious bodily injury to the victim because the existence of such intent could have been logically deduced from the victim’s testimony that he feared for his own safety, along with other testimony that defendant appeared to have come straight at the victim with his vehi-

cle. *Commodore v. State*, 994 So. 2d 864 (Miss. Ct. App. 2008).

11. Sentence.

In a case where defendant was sentenced to eight years in prison with five years of post-release supervision after a guilty plea was entered to the crime of attempted burglary of a dwelling, a post-conviction relief motion was properly dismissed without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) because there was no ineffective assistance

of counsel where jurisdiction was included in an indictment, the charges were not contradictory, an attempt charge was appropriate, and appellant inmate's other self-serving arguments were wholly unsupported by the record. Moreover, a sentence was not illegal since a suspended sentence was not required in addition to post-release supervision, the sentence imposed was within the range permitted, and the inmate was not misinformed regarding his appellate rights. *McKinney v. State*, 7 So. 3d 291 (Miss. Ct. App. 2008).

CHAPTER 3

Crimes Against the Person

- SEC.
- 97-3-7. Simple assault; aggravated assault; simple domestic violence; aggravated domestic violence.
 - 97-3-13. False confinement; sending sane person to psychiatric hospital or institution.
 - 97-3-37. Homicide; killing of an unborn child; "human being" includes unborn child at every stage of gestation from conception until live birth for purposes of offenses of assault and homicide; "unborn child" defined; intentional injury to pregnant woman; penalties; provisions of section not applicable to legal medical procedures, including abortion.
 - 97-3-52. Prohibition against selling, buying, offering to sell and offering to buy child or unborn child; penalties.
 - 97-3-53. Kidnapping; punishment.
 - 97-3-54.4. Anti-Human Trafficking Act; definitions.
 - 97-3-65. Statutory rape; enhanced penalty for forcible sexual intercourse or statutory rape by administering certain substances.
 - 97-3-104. Crime of sexual activity between certain individuals and offenders incarcerated in correctional facilities or on correctional supervision; sanctions.
 - 97-3-107. Stalking; aggravated stalking; penalties; definitions.

§ 97-3-7. Simple assault; aggravated assault; simple domestic violence; aggravated domestic violence.

(1)(a) A person is guilty of simple assault if he (i) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; (ii) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (iii) attempts by physical menace to put another in fear of imminent serious bodily harm; and, upon conviction, he shall be punished by a fine of not more than Five Hundred Dollars (\$500.00) or by imprisonment in the county jail for not more than six (6) months, or both.

(b) However, a person convicted of simple assault (i) upon a statewide elected official, law enforcement officer, fireman, emergency medical person-

nel, public health personnel, social worker or family protection specialist or family protection worker employed by the Department of Human Services or another agency, youth detention center personnel, training school juvenile care worker, any county or municipal jail officer, superintendent, principal, teacher or other instructional personnel, school attendance officer, school bus driver, or a judge of a circuit, chancery, county, justice, municipal or youth court or a judge of the Court of Appeals or a justice of the Supreme Court, district attorney, legal assistant to a district attorney, county prosecutor, municipal prosecutor, court reporter employed by a court, court administrator, clerk or deputy clerk of the court, or public defender, while such statewide elected official, judge or justice, law enforcement officer, fireman, emergency medical personnel, public health personnel, social worker, family protection specialist, family protection worker, youth detention center personnel, training school juvenile care worker, any county or municipal jail officer, superintendent, principal, teacher or other instructional personnel, school attendance officer, school bus driver, district attorney, legal assistant to a district attorney, county prosecutor, municipal prosecutor, court reporter employed by a court, court administrator, clerk or deputy clerk of the court, or public defender is acting within the scope of his duty, office or employment; (ii) upon a legislator while the Legislature is in regular or extraordinary session or while otherwise acting within the scope of his duty, office or employment; or (iii) upon a person who is sixty-five (65) years of age or older or a person who is a vulnerable adult, as defined in Section 43-47-5, shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00) or by imprisonment for not more than five (5) years, or both.

(2)(a) A person is guilty of aggravated assault if he (i) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; (ii) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (iii) causes any injury to a child who is in the process of boarding or exiting a school bus in the course of a violation of Section 63-3-615; and, upon conviction, he shall be punished by imprisonment in the county jail for not more than one (1) year or in the Penitentiary for not more than twenty (20) years.

(b) However, a person convicted of aggravated assault (i) upon a statewide elected official, law enforcement officer, fireman, emergency medical personnel, public health personnel, social worker, family protection specialist, family protection worker employed by the Department of Human Services or another agency, youth detention center personnel, training school juvenile care worker, any county or municipal jail officer, superintendent, principal, teacher or other instructional personnel, school attendance officer, school bus driver, or a judge of a circuit, chancery, county, justice, municipal or youth court or a judge of the Court of Appeals or a justice of the Supreme Court, district attorney, legal assistant to a district attorney, county prosecutor, municipal prosecutor, court reporter employed by a court,

court administrator, clerk or deputy clerk of the court, or public defender, while such statewide elected official, judge or justice, law enforcement officer, fireman, emergency medical personnel, public health personnel, social worker, family protection specialist, family protection worker, youth detention center personnel, training school juvenile care worker, any county or municipal jail officer, superintendent, principal, teacher or other instructional personnel, school attendance officer, school bus driver, district attorney, legal assistant to a district attorney, county prosecutor, municipal prosecutor, court reporter employed by a court, court administrator, clerk or deputy clerk of the court, or public defender is acting within the scope of his duty, office or employment; (ii) upon a legislator while the Legislature is in regular or extraordinary session or while otherwise acting within the scope of his duty, office or employment; or (iii) upon a person who is sixty-five (65) years of age or older or a person who is a vulnerable adult, as defined in Section 43-47-5, shall be punished by a fine of not more than Five Thousand Dollars (\$5,000.00) or by imprisonment for not more than thirty (30) years, or both.

(3) A person is guilty of simple domestic violence who commits simple assault as described in subsection (1) of this section against a current or former spouse of the defendant or a child of that person, a person living as a spouse or who formerly lived as a spouse with the defendant or a child of that person, a parent, grandparent, child, grandchild or someone similarly situated to the defendant, a person who has a current or former dating relationship with the defendant, or a person with whom the defendant has had a biological or legally adopted child and, upon conviction, the defendant shall be punished as provided under subsection (1) of this section; however, upon a third or subsequent conviction of simple domestic violence, whether against the same or another victim and within five (5) years, the defendant shall be guilty of a felony and sentenced to a term of imprisonment not less than five (5) nor more than ten (10) years. In sentencing, the court shall consider as an aggravating factor whether the crime was committed in the physical presence or hearing of a child under sixteen (16) years of age who was, at the time of the offense, living within either the residence of the victim, the residence of the perpetrator, or the residence where the offense occurred.

(4) A person is guilty of aggravated domestic violence who commits aggravated assault as described in subsection (2) of this section against, or who strangles, or attempts to strangle, a current or former spouse of the defendant or a child of that person, a person living as a spouse or who formerly lived as a spouse with the defendant or a child of that person, a parent, grandparent, child, grandchild or someone similarly situated to the defendant, a person who has a current or former dating relationship with the defendant, or a person with whom the defendant has had a biological or legally adopted child. Upon conviction, the defendant shall be punished by imprisonment in the custody of the Department of Corrections for not less than two (2) years nor more than twenty (20) years; however, upon a third or subsequent conviction of aggravated domestic violence, whether against the same or another victim and

within five (5) years, the defendant shall be guilty of a felony and sentenced to a term of imprisonment of not less than ten (10) nor more than twenty (20) years. In sentencing, the court shall consider as an aggravating factor whether the crime was committed in the physical presence or hearing of a child under sixteen (16) years of age who was, at the time of the offense, living within either the residence of the victim, the residence of the perpetrator, or the residence where the offense occurred. Reasonable discipline of a child, such as spanking, is not an offense under this subsection (4). A person convicted of aggravated domestic violence shall not be eligible for parole under the provisions of Section 47-7-3(1) (c) until he shall have served one (1) year of his sentence.

For the purposes of this section, “strangle” means to restrict the flow of oxygen or blood by intentionally applying pressure on the neck or throat of another person by any means or to intentionally block the nose or mouth of another person by any means.

(5) “Dating relationship” means a social relationship as defined in Section 93-21-3.

(6) Every conviction of domestic violence may require as a condition of any suspended sentence that the defendant participate in counseling or treatment to bring about the cessation of domestic abuse. The defendant may be required to pay all or part of the cost of the counseling or treatment, in the discretion of the court.

(7) When investigating allegations of a violation of subsection (3) or (4) of this section, law enforcement officers shall utilize the form prescribed for such purposes by the Office of the Attorney General in consultation with the sheriff’s and police chief’s associations. However, failure of law enforcement to utilize the uniform offense report shall not be a defense to a crime charged under subsection (3) or (4) of this section.

(8) In any conviction of assault as described in any subsection of this section which arises from an incident of domestic violence, the sentencing order shall include the designation “domestic violence.” The court clerk shall enter the disposition of the matter into the corresponding uniform offense report.

SOURCES: Codes, 1857, ch. 64, art. 18; 1871, § 2497; 1880, § 2711; 1892, § 967; 1906, § 1043; Hemingway’s 1917, § 771; 1930, § 787; 1942, § 2011; Laws, 1974, ch. 458, § 1; Laws, 1992, ch. 431, § 2; Laws, 1993, ch. 580, § 1; Laws, 1998, ch. 425, § 1; Laws, 1998, ch. 525, § 1; Laws, 1999, ch. 552, § 2; Laws, 2000, ch. 552, § 1; Laws, 2001, ch. 566, § 1; Laws, 2002, ch. 353, § 1; Laws, 2004, ch. 489, § 9; Laws, 2006, ch. 589, § 1; Laws, 2006, ch. 600, § 11; Laws, 2007, ch. 589, § 10; Laws, 2008, ch. 391, § 2; Laws, 2008, ch. 553, § 1; Laws, 2009, ch. 433, § 3; Laws, 2010, ch. 536, § 1; Laws, 2011, ch. 481, § 3; Laws, 2012, ch. 514, § 8, eff from and after July 1, 2012.

Joint Legislative Committee Note — Section 2 of ch. 391, Laws of 2008, effective July 1, 2008 (approved March 31, 2008), amended this section. Section 1 of ch. 553, Laws of 2008, effective July 1, 2008 (approved May 10, 2008), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 553, Laws of 2008,

which contains language that specifically provides that it supersedes § 97-3-7 as amended by Laws of 2008, ch. 391.

Editor's Note — Near the end of both (1) and (2) there is a reference to “vulnerable adult as defined in Section 43-47-5.” Laws of 2010, ch. 357, amended Section 43-47-5 and substituted “vulnerable person” for “vulnerable adult.”

Amendment Notes — The 2007 amendment inserted “youth detention center personnel, any county or municipal jail officer” everywhere it appears in (1) and (2); added (7), and redesignated former (7) as present (8); and added the last sentence in (8).

The first 2008 amendment (ch. 391), in (3) and (4), inserted “a person living as a spouse or who formerly lived as a spouse with the defendant, other persons related by consanguinity or affinity who reside with or formerly resided with the defendant,” and inserted “or former” preceding “dating relationship”; and in (5), substituted “as defined in Section 93-21-3” for “of a romantic or intimate nature.”

The second 2008 amendment (ch. 553) inserted “training school juvenile care worker” everywhere it appears in (1) and (2); added (c) in the second sentences of (1) and (2); and made minor stylistic changes.

The 2009 amendment inserted “or a child of that person” both times it appears in the first sentence of (3) and (4); and deleted the former last sentence in (7), which read: “In cases in which the investigation results in an arrest, a copy of the offense report shall be provided to the Office of the Attorney General.”

The 2010 amendment rewrote the first paragraph of (4), and added the second paragraph.

The 2011 amendment inserted item (c) in the first sentence in (2) and made a related change.

The 2012 amendment rewrote the first two sentences in (3) and (4); added the last sentence in (7); rewrote the last sentence in (8); and made minor stylistic changes throughout.

Cross References — Mississippi Protection Order Registry, see § 93-21-25.

JUDICIAL DECISIONS

1. In general; definitions and distinctions.
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1. In general; definitions and distinctions.

Where an altercation begins with a simple assault but as a matter of law escalates in a continuous sequence of events to an aggravated assault, the simple assault is subsumed into the aggravated assault. *Downs v. State*, 962 So. 2d 1255 (Miss. 2007).

Under Mississippi law, domestic violence, as defined in Miss. Code Ann. § 97-3-7(3), is not a lesser-included offense of kidnapping, a violation of Miss. Code Ann. § 97-3-53, because the two are independent crimes with distinct elements; the elements of domestic violence are not among the elements of kidnapping. *Busby v. State*, 956 So. 2d 1112 (Miss. Ct. App. 2007).

Defendant, who was convicted of kidnapping, a violation of Miss. Code Ann.

§ 97-3-53, was not entitled to a jury instruction on domestic violence under Miss. Code Ann. § 97-3-7(3) as a lesser included offense because the two were independent crimes with distinct elements. *Busby v. State*, 956 So. 2d 1112 (Miss. Ct. App. 2007).

2. Intent; generally.

3. —Sufficiency of.

Defendant's conviction for burglary of a dwelling, in violation of Miss. Code Ann. § 97-17-23(1), was supported by the evidence because defendant crashed through a glass window and advanced briskly upon one victim with hands raised, in what was described as a threatening gesture; hence, the evidence was sufficient to infer that defendant intended to commit an assault under Miss. Code Ann. § 97-3-7(1). *Walker v. State*, 21 So. 3d 663 (Miss. Ct. App. 2009), writ of certiorari denied by 20 So. 3d 680, 2009 Miss. LEXIS 578 (Miss. 2009).

Defendant's conviction for simple assault upon a law enforcement officer pursuant to Miss. Code Ann. § 97-3-7(1)(a) was appropriate because an officer's testimony that defendant, while resisting arrest, swung the handcuffs at him, supported the inference that she did so purposely and knowingly. There was no evidence concerning the distances involved that would have cast doubt upon the veracity of the officers' testimonies that defendant swung the handcuffs at the first officer, who ducked, which permitted the handcuffs to strike the other officer in the face. *Hitt v. State*, 988 So. 2d 939 (Miss. Ct. App. 2008).

4. Deadly weapon.

Assault conviction was affirmed where defendant's use of hands and fists to strike the victim constituted a means likely to produce serious bodily harm, which was sufficient under Miss. Code Ann. § 97-3-7(2)(b). *Parks v. State*, 930 So. 2d 383 (Miss. 2006).

Defendant's challenge to his conviction for aggravated assault under Miss. Code Ann. § 97-3-7 on the grounds that the butt of his gun was not a dangerous weapon was without merit because it was within the province of the jury to deter-

mine whether or not the use of the gun as a bludgeoning instrument made it a deadly weapon. *Beyers v. State*, 930 So. 2d 456 (Miss. Ct. App. 2006).

5. Indictment or affidavit; generally.

6. —Sufficiency of.

In a 28 U.S.C.S. § 2254 proceeding which a pro se state inmate argued that his indictment was defective because it did not contain the word serious as required by Miss. Code Ann. § 97-3-7(2)(a), that claim was examined and rejected by the Mississippi Court of Appeals, and provided no basis for habeas relief. *White v. Epps*, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 33009 (S.D. Miss. Apr. 2, 2010).

Defendant's argument that his convictions for aggravated assault on law enforcement officers should be reversed and remanded or that he should be resentenced on the lesser charge of simple assault on law enforcement officers was without merit. The heading of defendant's indictment stated that he was being charged with aggravated assault on a law enforcement officer and the counts stated that statute under which he was charged; thus, it was clear from the indictment that he injured the two police officers with a deadly weapon. *Mayers v. State*, 42 So. 3d 33 (Miss. Ct. App. 2010), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

Indictment for aggravated assault, Miss. Code Ann. § 97-3-7 (Rev. 2006), was not fatally defective because it did not need to specify an overt act of attempt where defendant was not indicted under the general attempt statute, Miss. Code Ann. § 97-1-7 (Rev. 2006). Thus, the previous decision in *Joshua v. State*, 445 So. 2d 221 (Miss. 1984), which held that the separate elements of attempt had to be set out in a criminal indictment for aggravated assault, was expressly overruled. *Brooks v. State*, 18 So. 3d 833 (Miss. 2009).

Where the evidence showed that appellant used a deadly weapon to strike his current spouse and to shoot the other victim, the State showed intent to cause bodily injury with a deadly weapon. The indictment charging him with aggravated assault under Miss. Code Ann. § 97-3-

7(2)(b) and aggravated domestic violence under Miss. Code Ann. § 97-3-7(4) was not defective; defendant pleaded guilty to both counts. *McComb v. State*, 986 So. 2d 1087 (Miss. Ct. App. 2008), writ of certiorari dismissed by 36 So. 3d 455, 2010 Miss. LEXIS 285 (Miss. 2010).

Aggravated assault indictment was not defective for failing to allege serious bodily injury because the injury in question was inflicted with a deadly weapon. *Crawford v. State*, 972 So. 2d 44 (Miss. Ct. App. 2008).

Motion for post-conviction relief was denied based on an amended indictment in an aggravated assault case because the failure to include the phrase “thereby manifesting extreme indifference to the value of human life” was not erroneous since this was not an element of the crime; moreover, all of the requirements for indictments under Miss. Unif. Cir. & Cty. R. 7.06 were met. *Nichols v. State*, 955 So. 2d 962 (Miss. Ct. App. 2007).

7. Defenses; generally.

7.5. — Insanity.

Even though counsel was deficient in failing to pursue an insanity defense in an aggravated assault case, defendant was not prejudiced thereby because the M’Naghten test was not satisfied; defendant understood the consequences of his actions. Defendant stated that he shot his stepfather for “messing with his mother’s mind.” *Epps v. State*, 984 So. 2d 1042 (Miss. Ct. App. 2008).

8. — Self-defense.

Defendant’s convictions for aggravated assault in violation of Miss. Code Ann. § 97-3-7(2) were improper because the evidence indicated that defendant was acting in necessary self-defense when the projectiles from his firearm struck the bystanders. Defendant had no unlawful intent to cause bodily injury to the bystanders with a deadly weapon and he did not act recklessly under circumstances manifesting extreme indifference to the value of human life; at that moment in the conflict, defendant was attempting to preserve his own life. *Rogers v. State*, 994 So. 2d 792 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 668 (Miss. 2008).

State was not required to prove that defendant was not acting with self defense in order to prove a conviction for aggravated assault under Miss. Code Ann. § 97-3-7(2)(b). *Beyers v. State*, 930 So. 2d 456 (Miss. Ct. App. 2006).

9.5. Double jeopardy.

Defendant was not subject to double jeopardy, even though defendant was issued a citation for resisting arrest and was later convicted of simple assault on a law enforcement officer, where a clear reading of the statutes established that the two offenses contained an element that was lacking from the other. *Roncali v. State*, 980 So. 2d 959 (Miss. Ct. App. 2008).

Defendant’s claim of double jeopardy, pursuant to the Fifth Amendment, was without merit where application of the Blockburger test revealed that elements of each of the crimes of shooting into a vehicle, Miss. Code Ann. § 97-25-47, and aggravated assault, Miss. Code Ann. § 97-3-7(2) were not contained in the other. *Graves v. State*, 969 So. 2d 845 (Miss. 2007).

10. Evidence; generally.

Defendant’s convictions for murder and aggravated assault, under Miss. Code Ann. §§ 97-3-19(1), 97-3-7(2), were not against the weight of the evidence because allowing the verdict to stand would not have sanctioned an unconscionable injustice because there was nothing that would have led an appellate court to disagree with a jury’s assessment of the conflicting testimony with which it was presented. *Readus v. State*, 997 So. 2d 941 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 27 (Miss. 2009).

Conviction for aggravated assault under Miss. Code Ann. § 97-3-7(2)(b) was supported by the weight of the evidence because witnesses testified that defendant was actively engaged in a drunken fight, a friend of defendant’s testified that deadly force was not necessary, defendant admitted wielding a knife, no evidence was presented that the injuries were from another source, and someone observed defendant stab a victim after blinding him with a shirt; therefore, a new trial was not

warranted. *Lackie v. State*, 971 So. 2d 601 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2007 Miss. LEXIS 683 (Miss. 2007).

11. — Admissibility.

Defendant's convictions for capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e), aggravated assault in violation of Miss. Code Ann. § 97-3-7(2), and conspiracy to commit aggravated assault were appropriate because the victim's autopsy photographs were admissible since their probative value was not outweighed by any danger of undue prejudice and since there was a meaningful evidentiary purpose. *Williams v. State*, 3 So. 3d 105 (Miss. 2009).

In a case in which defendant was convicted of violating Miss. Code Ann. § 97-3-7(2)(b), the trial judge did not err by not admitting evidence of the victim's continued intimacy with defendant after the assault. Defendant had argued that such evidence might be relevant in assessing her veracity, but the trial judge would not allow the testimony into evidence finding that any subsequent fraternization between defendant and the victim was irrelevant; the trial judge stated that the crime was committed not only against the victim but also against the laws of the State of Mississippi, and defendant cited no relevant authority for the appellate court to determine otherwise. *Carter v. State*, 995 So. 2d 847 (Miss. Ct. App. 2008).

12. — Nature of injuries.

Trial court did not abuse its discretion by allowing the prosecution to display the injured child to the jury because: (1) under Miss. Const. Art. 3, § 26A and Miss. Code Ann. § 99-43-21 (Rev. 2007), the victim had the right to be present and be heard during the criminal proceedings; (2) the State was required to offer proof of serious bodily injury in order to convict defendant of aggravated assault; and (3) the probative value of the jury's viewing the child's injuries was not substantially outweighed by unfair prejudice to defendant. *Harris v. State*, 979 So. 2d 721 (Miss. Ct. App. 2008).

In order to prove a conviction for aggravated assault in violation of Miss. Code

Ann. § 97-3-7(2)(b), the state was not required to show that the victim suffered serious bodily injury, but was only required to show that defendant's injurious action was likely to cause such a result. *Beyers v. State*, 930 So. 2d 456 (Miss. Ct. App. 2006).

13. — Other offenses or conduct.

Defendant was entitled to a new trial as to an aggravated assault count because a retroactive misjoinder occurred as the admission into evidence by stipulation of defendant's prior felony conviction regarding a felon in possession of a knife count, when the evidence was insufficient to sustain the felon in possession count, prejudiced defendant's defense on the aggravated assault count. *Williams v. State*, 37 So. 3d 717 (Miss. Ct. App. 2010).

In a case in which defendant appealed his conviction for violating Miss. Code Ann. § 97-3-7(2)(a), he unsuccessfully argued that the trial court erred in allowing the victim's wife to testify about an encounter she and defendant had months after the incident. Defendant contended that the wife's testimony was not relevant, and its prejudicial effect outweighed its probative value in violation of Miss. R. Evid. 403, but the evidence was offered to show defendant's state of mind on the day of the assault; the trial court weighed the probative value of the evidence against the potential for undue prejudice. *David v. State*, 29 So. 3d 129 (Miss. Ct. App. 2010).

In defendant's trial on a charge of aggravated assault for stabbing the woman with whom he lived, the trial court erred in permitting the prosecutor to inquire into the details of defendant's previous conviction for aggravated assault for shooting a woman. The error was not harmless because evidence of defendant's prior conviction for the same crime of aggravated assault was highly prejudicial and because it permitted the exact inference that Miss. R. Evid. 404(b) sought to prevent. *Thomas v. State*, 19 So. 3d 130 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 485 (Miss. 2009).

In defendant's trial on a charge of aggravated assault for stabbing the woman with whom he lived, the trial court erred in permitting the prosecutor to inquire

into the details of his previous conviction for aggravated assault for shooting a woman. Although the prosecutor argued that the evidence was admissible under Miss. R. Evid. 404(b) to show motive, opportunity, or intent because it was evidence that defendant liked to assault women, there was no proof that defendant's conviction for shooting another woman years earlier had any effect upon his motive, opportunity, or intent to stab his current victim. *Thomas v. State*, 19 So. 3d 130 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 485 (Miss. 2009).

Defendant's conviction for aggravated domestic violence against his girlfriend pursuant to Miss. Code Ann. § 97-3-7(4) was appropriate because defendant's statements in which he alluded to prior domestic violence were admissible under Miss. R. Evid. 404(b) to show the absence of an accident; additionally, the circuit court did not abuse its discretion when it found that the evidence was more probative than prejudicial. *Fugate v. State*, 951 So. 2d 604 (Miss. Ct. App. 2007).

Defendant's conviction for aggravated assault in violation of Miss. Code Ann. § 97-3-7(2)(b) was appropriate because the testimony provided by the victim and another dispelled the argument in support of allowing testimony under Miss. R. Evid. 404(a)(2) to prove a character trait for violence on the part of the victim; the evidence at issue failed to demonstrate that the victim was the initial aggressor during a prior incident. *Gates v. State*, 936 So. 2d 335 (Miss. 2006).

15. — Sufficiency.

Evidence was legally insufficient to sustain a conviction for simple assault domestic violence under Miss. Code Ann. § 97-3-7 because appellant did not confess to committing the assault, there was no eyewitness testimony, and there were other reasonable hypotheses consistent with appellant's innocence as to how an incident occurred. *Inter alia*, the victim could have sustained injuries after he attacked appellant first. *Mills v. City of Water Valley*, 66 So. 3d 193 (Miss. Ct. App. 2011).

In a case of aggravated assault under Miss. Code Ann. § 97-3-7(2)(b), the evi-

dence was sufficient to prove defendant shot the victim "purposely" or "knowingly" where defendant shot the victim eight or nine times following an argument and was aware of defendant's actions before and after the shooting. *Williams v. State*, 61 So. 3d 981 (Miss. Ct. App. 2011).

Evidence was sufficient to sustain a conviction for simple assault, pursuant to Miss. Code Ann. § 99-19-81, where the assault victim testified that defendant attacked her with a knife immediately after defendant fatally stabbed another victim in the chest. *Porter v. State*, 33 So. 3d 535 (Miss. Ct. App. 2010).

While defendant and the State presented conflicting testimony in defendant's aggravated assault trial, the verdict was not against the overwhelming weight of the evidence where the State's proof met the elements of aggravated assault pursuant to Miss. Code Ann. § 97-3-7(2), because the jury was the sole judge of the witnesses' credibility. *Camper v. State*, 24 So. 3d 1072 (Miss. Ct. App. 2010).

Evidence was insufficient to support defendant's convictions for aggravated assault under Miss. Code Ann. § 97-3-7(2), and other crimes, because, by limiting cross-examination, the jury was denied the ability to properly resolve the weight and credibility of the testimony of the only witness capable of identifying the perpetrator. Therefore, the record failed to reflect beyond a reasonable doubt that the error complained of did not contribute to the verdict. *Mendenhall v. State*, 18 So. 3d 915 (Miss. Ct. App. 2009).

Evidence was sufficient to convict defendant of aggravated assault where defendant attempted to purposely or knowingly cause bodily injury to the law enforcement officers; defendant was described as agitated, irate, and hostile, and he made slashing motions at the deputies with a knife, and he was holding his son in front of him as a shield. *Babb v. State*, 17 So. 3d 100 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 440 (Miss. 2009).

In defendant's trial for kidnapping, sexual battery, and aggravated assault, the evidence was sufficient to sustain defendant's conviction because the victim testi-

fied that defendant put his hand over the victim's neck and began choking her; the victim also testified that she lost consciousness, and a nurse testified that the victim suffered petechiae and hemorrhaging to her eyes, which could be caused by strangulation. There was more than sufficient for a rational trier of fact to find the essential elements of aggravated assault. *Moore v. State*, 996 So. 2d 756 (Miss. 2008).

In an aggravated domestic assault case, for purposes of expert testimony, to the extent that the officer blurred the line between fact and opinion testimony with regard to his testimony that he would have expected defendant to have more severe injuries if he had been defending himself against a knife attack, any error was harmless in light of the overwhelming weight of the evidence of his guilt, including (1) the photographs of the victim's injuries; (2) the photographs of the ironing board he used to beat the victim; (3) the photographs of defendant's injuries; and (4) the testimony of the victim and her neighbor. *Hicks v. State*, 6 So. 3d 1099 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 161 (Miss. 2009).

As the trier of fact, the jury found that the overwhelming weight of the evidence showed that defendant deliberately and knowingly shot the husband without authority of law and not in necessary self-defense and thus was guilty of aggravated assault under Miss. Code Ann. § 97-3-7(2). The court found no error with such finding, as the evidence included that defendant and her husband were fighting, that she shot him, and that he hit her after being shot in an effort to obtain the gun; thus, the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Lawrence v. State*, 3 So. 3d 754 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 101 (Miss. 2009).

Evidence was sufficient to convict defendant of two counts of simple assault when the testimony presented at trial showed that defendant had pointed an assault rifle at police officers. *McGregory v. State*, 979 So. 2d 12 (Miss. Ct. App. 2008).

Where defendant and his cohort had been riding around discussing ways to

make money, they approached the victims' house, knocked on the door, made up a story about running out of gas, then shot two victims, and fled the house when one of the victims' did not go down after being shot multiple times. A rational juror could have found beyond a reasonable doubt that defendant aided and abetted the crimes of armed robbery and aggravated assault in violation of Miss. Code Ann. § 97-3-7. *Hughes v. State*, 983 So. 2d 270 (Miss. 2008), writ of certiorari denied by 555 U.S. 1052, 129 S. Ct. 633, 172 L. Ed. 2d 620, 2008 U.S. LEXIS 8544, 77 U.S.L.W. 3324 (2008).

Sufficient evidence supported defendant's conviction for aggravated assault, in violation of Miss. Code Ann. § 97-3-7(2)(a), where defendant admitted to discharging a weapon with the intent to scare the victim, and aggravated the conditions of the crime by employing a deadly weapon. *Harris v. State*, 970 So. 2d 151 (Miss. 2007).

Defendant's convictions for the simple assault of a peace officer in violation of Miss. Code Ann. § 97-3-7(1) were appropriate because the evidence was sufficient. The State presented ample evidence that defendant attacked the officers with punches and kicks and the officers testified that they had no idea what the purpose of defendant's actions was or whether he was armed; the officers also admitted that those unknowns and defendant's physical attacks placed them in fear of imminent serious bodily harm. *Graham v. State*, 967 So. 2d 670 (Miss. Ct. App. 2007).

Evidence was sufficient to sustain defendant's conviction for aggravated assault under Miss. Code Ann. § 97-3-7(2)(b) and was not against the weight of the evidence because: (1) the victim, who was renting a garage apartment from the home owner, stated that when he first went into the house, defendant was in bed, but while he was in the kitchen defendant kicked in the door and stated that he was going to kill the victim; (2) the victim testified that defendant hit and pushed the home owner against the wall then began attacking him; (3) and the victim testified that he eventually overpowered defendant and threw him on a

bed, but not before defendant stabbed him while he was coming through the hall. *White v. State*, 958 So. 2d 241 (Miss. Ct. App. 2007).

Given the evidence in the record, a reasonable juror could find defendant guilty of aggravated assault beyond a reasonable doubt under Miss. Code Ann. § 97-3-7; the evidence showed that defendant initiated the altercation, struck the first blow, and repeatedly stabbed the victim. *Bobo v. State*, 953 So. 2d 282 (Miss. Ct. App. 2007).

Defendant's convictions for aggravated assault and shooting into an occupied dwelling were not against the overwhelming weight of the evidence because: (1) the victim and a witness testified that they told police right away that defendant was the shooter; (2) the victim's mother testified that one week before the shooting the victim's sister and defendant's ex-girlfriend called home scared because defendant had threatened to shoot up the house or to set it on fire; (3) the victim's mother testified that it was that same week she spotted defendant trying to break into the home; and (4) defendant's brother-in-law testified that defendant admitted that he shot the victim. *Brown v. State*, 986 So. 2d 308 (Miss. Ct. App. 2006), reversed by, remanded by 986 So. 2d 270, 2008 Miss. LEXIS 340 (Miss. 2008).

Evidence was sufficient to convict defendant of aggravated assault, despite two witnesses' recantations; the elements of aggravated assault were proven, and it was the jury's responsibility to weigh the credibility of the witnesses' testimony at trial. *Townsend v. State*, 939 So. 2d 796 (Miss. 2006).

Defendant's conviction for aggravated assault in violation of Miss. Code Ann. 97-3-7(2) was appropriate because, even though a DNA report itself was not admitted into evidence, the substance of its conclusion was before the jury and defendant failed to show that he was prejudiced by not possessing the report until the first day of his fourth trial. *Curry v. State*, 939 So. 2d 785 (Miss. 2006).

Evidence was sufficient to convict defendant of aggravated assault where the victim testified to her injuries and the act itself, and defendant presented no evi-

dence to contradict this; reasonable minds could have found beyond a reasonable doubt that defendant was guilty. *Brown v. State*, 934 So. 2d 1039 (Miss. Ct. App. 2006).

Sufficient evidence existed to convict defendant of aggravated assault because the victim and the husband testified that defendant shot the victim, two defense witnesses testified that defendant shot in the direction of the victim, and only defendant denied either shooting the victim or having a gun. *Smith v. State*, 946 So. 2d 785 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 55 (Miss. 2007).

16. — Charge or conviction sup- portable.

Trial court did not err by denying defendant's motion for a directed verdict because under the indictment, which charged defendant with attempted aggravated assault in violation of Miss. Code Ann. § 97-3-7(2), the State simply had to prove that defendant attempted to cause bodily injury to the victim with a deadly weapon, and based on the evidence presented at trial, a reasonable jury could have concluded that defendant intended to cause bodily injury to the victim by using a deadly weapon; during the trial, the victim testified that he was involved in an altercation with defendant on the day of the incident, the victim and witnesses all testified that they saw defendant raise a gun and fire the gun at their car, and a bullet was recovered from the seal of the driver's side door, which was where the victim was sitting. *Johnson v. State*, 50 So. 3d 335 (Miss. Ct. App. 2010), writ of certiorari denied by 50 So. 3d 1003, 2011 Miss. LEXIS 7 (Miss. 2011).

Circuit court did not err in denying a defendant's motion for a directed verdict because the evidence before the jury was more than sufficient to sustain a finding of guilty of aggravated assault in violation of Miss. Code Ann. § 97-3-7(2); the evidence showed that defendant shot the victim after a tussle over the gun had transpired, and regardless of whether defendant was attempting to pistol whip or shoot the victim, there was still sufficient evidence to show that defendant knowingly and purposely caused bodily injury to the vic-

tim by using a deadly weapon. *Adams v. State*, 33 So. 3d 1179 (Miss. Ct. App. 2010).

Defendant was properly convicted of aggravated assault, a violation of Miss. Code Ann. § 97-3-7(2), because, although the circuit judge abused her discretion by prohibiting defendant from developing evidence to impeach the victim's earlier denial of bias against defendant, due to the overwhelming evidence of defendant's guilt, the complained of error was harmless. *Banks v. State*, 45 So. 3d 676 (Miss. Ct. App. 2010).

Defendant's argument that the State failed to prove an essential element of aggravated assault on a law enforcement officer because he did not knowingly shoot the law enforcement officers was without merit Miss. Code Ann. § 97-3-7(2). Defendant asserted that he thought someone was breaking into the apartment and fired a gun toward the door in self-defense, but the appellate court stated that the jury was presented with sufficient evidence to determine that defendant knew or should have known that the men outside his door were police officers; in part, an officer testified that all members of the team were announcing their presence as loudly as they could. *Mayers v. State*, 42 So. 3d 33 (Miss. Ct. App. 2010), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

Defendant's conviction for aggravated assault in violation of Miss. Code Ann. § 97-3-7(2)(b) was appropriate because it was entirely likely for reasonable jurors to conclude that the act of attaching a home-made knife to the end of a crutch and then extending the crutch in the vicinity of the victim's head and neck amounted to an attempt at causing bodily injury with a weapon likely to cause serious bodily injury. *Kendrick v. State*, 21 So. 3d 1186 (Miss. Ct. App. 2009).

Defendant's convictions for house burglary, aggravated assault in violation of Miss. Code Ann. § 97-3-7(2), armed robbery, and auto theft were proper because the evidence was sufficient. In part, defendant severely beat the victim, demanded that she give him her purse, and then took her purse, a gun, and a set of keys to the victim's vehicle. The victim later identi-

fied defendant, based upon her own independent recollection, in a photographic lineup. *Brunner v. State*, 37 So. 3d 645 (Miss. Ct. App. 2009), writ of certiorari denied by 36 So. 3d 455, 2010 Miss. LEXIS 323 (Miss. 2010).

Conviction for aggravated assault under Miss. Code Ann. § 97-3-7(2) was not contrary to the weight of the evidence because the State was not required to produce an actual item used to cut the victim's throat. The victim testified about her stabbing and the object used, and she also showed the jury the scars on her neck. *Perryman v. State*, 16 So. 3d 41 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 404 (Miss. 2009).

Where defendant disarmed his victim and fired the gun in the victim's direction and into a crowded nightclub, killing the victim and another and wounding three others, the trial court did not err in denying defendant's motion for a judgment notwithstanding the verdict because the evidence was sufficient to support defendant's convictions of murder, aggravated assault, and felon in possession of a firearm. *Roberson v. State*, 19 So. 3d 95 (Miss. Ct. App. 2009).

Defendant's conviction for aggravated assault in violation of Miss. Code Ann. § 97-3-7(2) was appropriate even though there was no direct proof that defendant intended to cause serious bodily injury to the victim because the existence of such intent could have been logically deduced from the victim's testimony that he feared for his own safety, along with other testimony that defendant appeared to have come straight at the victim with his vehicle. *Commodore v. State*, 994 So. 2d 864 (Miss. Ct. App. 2008).

Trial court did not abuse its discretion by denying a defendant's motion for a new trial with respect to a simple assault charge because: (1) the only essential fact in dispute was whether a car was occupied when defendant fired shots into it; (2) evidence that the car was occupied included testimony by four adults that each of them and two minor children were in the car at the time; (3) the only contradictory evidence was defendant's own testimony and a written statement of his wife,

which was taken shortly after the incident; and (4) at trial, defendant's wife changed her version of the events and testified that she was suffering from post-traumatic stress at the time she wrote the statement. *Smith v. State*, 982 So. 2d 1007 (Miss. Ct. App. 2008).

Evidence was sufficient to support a conviction of both murder and aggravated assault, under Miss. Code Ann. §§ 97-3-19(1), 97-3-7(2), because a rational juror could have concluded beyond a reasonable doubt that defendant was guilty of both murder and aggravated assault because (1) the evidence tended to show that defendant acted recklessly in the commission of an imminently dangerous act and with extreme indifference to human life; (2) the State produced evidence showing that defendant fired a gun inside of an apartment that contained two unarmed individuals, as well as several children; (3) the State also established that defendant's firing of the gun resulted in the death of his wife and serious bodily injury to his stepson; and (4) defendant admitted pulling out the gun and firing it inside the apartment. *Readus v. State*, 997 So. 2d 941 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 217 (Miss. 2009).

Defendant's conviction for the aggravated assault of his sister-in-law in violation of Miss. Code Ann. § 97-3-7(2)(b) was appropriate because the evidence presented to the jury was more than sufficient to prove that an individual committed the assassination of defendant's brother, as well as the aggravated assault of the brother's wife while in the employ of defendant. In part, two witnesses testified that after their failed attempts to murder the brother and his wife in exchange for money, defendant contacted them and told them that he found someone else to complete the job. *Vickers v. State*, 994 So. 2d 200 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 675 (Miss. 2008).

Defendant's conviction for simple assault in violation of Miss. Code Ann. § 97-3-7(1) was appropriate because the evidence supported the reckless element of simple assault, whether the act was intentional or not, and a resulting bodily injury.

Defendant admitted that he grabbed the victim's shirt, and the end result of that scuffle was the victim's broken leg. *Graves v. State*, 984 So. 2d 1035 (Miss. Ct. App. 2008).

Evidence was sufficient to convict defendant of aggravated assault under Miss. Code Ann. § 97-3-7(2)(b) because: (1) the jury was instructed as to an alibi defense and resolved the issue against defendant; (2) evidence was presented that defendant was angry with the victim because of the victim's refusal to provide him with free liquor, and that defendant lunged at and pushed the victim, who was left with a knife dangling in his neck; (3) testimony that the victim did not see the knife being projected at him was of no consequence. *Crawford v. State*, 972 So. 2d 44 (Miss. Ct. App. 2008).

Defendant's conviction for aggravated assault in violation of Miss. Code Ann. § 97-3-7(2)(a) was appropriate because he admitted on cross-examination that the victim was seated in a vehicle when defendant fired the shot. Even if the appellate court was to believe that the victim was at some point wielding a baseball bat and that, at that point in time, defendant was afraid of being struck by the bat, defendant's own testimony revealed that the victim was not posing a threat when defendant fired the pistol. *Dao v. State*, 984 So. 2d 352 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 281 (Miss. 2008).

Defendant's conviction for aggravated assault pursuant to Miss. Code Ann. § 97-3-7(2) was appropriate because the victim testified that defendant swung at him and that he was bleeding as a result; another witness testified that he observed defendant and the victim argue and saw a "hand motion" from defendant during that argument, and afterwards the victim stated that defendant had cut him. *White v. State*, 958 So. 2d 290 (Miss. Ct. App. 2007).

Evidence supported a finding that defendant committed a delinquent act when she assaulted a teacher under Miss. Code Ann. § 97-3-7(1); defendant admitted to pushing a desk in front of the teacher, and she never claimed that this was an accident or that she did not intend to injure

the teacher. In the Interest of K.G., 957 So. 2d 1050 (Miss. Ct. App. 2007).

Evidence was legally sufficient for the jury to find defendant guilty of simple assault on a law enforcement officer under Miss. Code Ann. § 97-3-7(1) because: (1) the state produced evidence that the deputy was a law enforcement officer acting within the scope of his duty when he encountered defendant during a traffic stop; (2) the deputy testified that defendant struck him in the left temple area; (3) the deputy stated that defendant struck at his mouth and he positioned himself for a second strike; (4) the deputy testified that defendant used his left elbow while striking him in the temple and that the strike had to be intentional due to defendant having to extend his elbow behind his back to strike the deputy; (5) the deputy testified that defendant used his fist when striking him in the mouth; and (6) the deputy's testimony alone was sufficient for a conviction. *Keys v. State*, 963 So. 2d 1193 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 245, 2007 Miss. LEXIS 703 (Miss. 2007).

In a simple assault on a law enforcement officer case, the trial court properly denied defendant's motion for a new trial because the weight of the evidence supported the verdict because: (1) the deputy testified that defendant intentionally struck him in the temple and the mouth; (2) although defendant denied drinking alcohol, 13 beer cans were found in the toolbox in the back of his truck; (3) an empty beer can was found on the floor of his truck; (4) defendant admitted that he resisted arrest because the deputy was trying to charge him for a crime for which he claimed he did not commit; and (5) although defendant claimed that he might have accidentally hit the deputy, the deputy testified that he was struck intentionally. *Keys v. State*, 963 So. 2d 1193 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 245, 2007 Miss. LEXIS 703 (Miss. 2007).

Conviction for aggravated assault under Miss. Code Ann. § 97-3-7(2)(b) was supported by the sufficiency of the evidence because witnesses testified that defendant was an aggressor in a drunken fight, he was the only person with a knife,

and he was involved voluntarily; therefore, a trial court's failure to grant a motion for a directed verdict, failure to give a peremptory instruction, or failure to grant a judgment notwithstanding the verdict was not erroneous. *Lackie v. State*, 971 So. 2d 601 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2007 Miss. LEXIS 683 (Miss. 2007).

Defendant's convictions for two counts of aggravated assault were appropriate because the appellate court was unable to say that the prosecutor's overzealousness impacted the jury's verdict; there were several witnesses, in addition to the two victims, that testified that defendant was the perpetrator of the assault on the one victim and the other victim's testimony alone was sufficient to support defendant's conviction for stabbing her. *Whitehead v. State*, 967 So. 2d 56 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 966 So. 2d 172, 2007 Miss. LEXIS 601 (Miss. 2007).

Evidence was sufficient to support defendant's conviction of aggravated assault for pouring a bottle of rubbing alcohol on his girlfriend and then setting her on fire because, even though defendant and his girlfriend argued that the fire was an accident, the state offered substantial evidence to contradict their testimony. *Taylor v. State*, 954 So. 2d 944 (Miss. 2007).

Defendant's conviction for aggravated assault was appropriate because the evidence was sufficient to support the jury's verdict; the state had produced four witnesses, all of whom testified that the victim did not have a knife, or any other weapon, at the time of the incident, thus negating defendant's argument that the victim was the aggressor. *Hawthorne v. State*, 944 So. 2d 928 (Miss. Ct. App. 2006).

There was sufficient evidence to sustain a conviction for aggravated assault, despite the fact that a victim did not actually see defendant ram his car before a robbery allegedly occurred, because defendant admitted to being in an accident, portions of defendant's vehicle were found at the scene, and defendant's vehicle sustained heavy damage. *Sanders v. State*, 949 So. 2d 92 (Miss. Ct. App. 2006).

Motion for judgment notwithstanding the verdict or a new trial was properly

denied because there was sufficient evidence to sustain a conviction for aggravated assault where a murder victim's son was injured with a knife while trying to fend off the attack; the knife used was a deadly weapon, and the fact that no permanent injuries were suffered did not mean that the correct charge was simple assault. *Wilson v. State*, 936 So. 2d 357 (Miss. 2006).

Defendant's convictions for murder and aggravated assault in violation of Miss. Code Ann. § 97-3-19 and Miss. Code Ann. § 97-3-7(2) were proper because there was sufficient evidence from which a rational jury could have concluded that defendant possessed the gun and shot the victim with the gun, without any struggle between the two. *Anthony v. State*, 936 So. 2d 471 (Miss. Ct. App. 2006).

17. — Charge or conviction unportable.

Defendant was erroneously convicted of four counts of aggravated assault based on the act of firing one shot into a vehicle when the evidence supported only one attempt, as defendant's attempt to discharge a gun one time did not support the inference that defendant intended to injure four individuals. *Foreman v. State*, 51 So. 3d 957 (Miss. 2011).

19. Instructions; generally.

Defendant's convictions for the simple assault of a peace officer in violation of Miss. Code Ann. § 97-3-7(1) were appropriate because even though a jury instruction erroneously allowed the jury to find "physical menace" from words alone, it was a harmless error since it was contradicted that defendant attacked the officers with kicks and punches. *Graham v. State*, 967 So. 2d 670 (Miss. Ct. App. 2007).

Simple assault on a law enforcement officer charge resulted from injuries the deputy sustained when attempting to arrest defendant, and the evidence was uncontradicted that defendant engaged in a violent physical struggle with the deputy which resulted in both men sustaining multiple injuries; the trial judge determined that there was a lack of evidence to support a jury instruction on an illegal arrest, and thus the trial judge did not

abuse his discretion in denying defendant's jury instructions that he had the right to resist an unlawful arrest. *Keys v. State*, 963 So. 2d 1193 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 245, 2007 Miss. LEXIS 703 (Miss. 2007).

In an aggravated assault case, proposed jury instructions on the "single juror," the presumption of innocence and the state's burden of proof, and the elements of the offense were properly rejected because they were covered by instructions that had already been given; moreover, an accident instruction was rejected as not supported by the evidence since that doctrine did not apply to intentional acts. *Ellis v. State*, 956 So. 2d 1008 (Miss. Ct. App. 2007), writ of certiorari dismissed by 973 So. 2d 244, 2007 Miss. LEXIS 687 (Miss. 2007).

22. — Self-defense.

In a case in which defendant appealed his conviction for violating Miss. Code Ann. § 97-3-7(2)(a), he unsuccessfully argued that his jury instruction on self-defense should have been included. Part of the instruction given to the jury already properly instructed it on defendant's theory of self-defense. *David v. State*, 29 So. 3d 129 (Miss. Ct. App. 2010).

In a case in which defendant appealed his conviction for violating Miss. Code Ann. § 97-3-7(2)(a), he unsuccessfully argued that a jury instruction on self-defense should have been included. Since defendant did not cite to any authority for his assertion that the jury instruction on self-defense should have been included based on the disparity in size between the victim and defendant the testimony at trial, the assignment of error was procedurally barred. *David v. State*, 29 So. 3d 129 (Miss. Ct. App. 2010).

In an aggravated assault case, three separate instructions given to the jury were not error because they adequately informed the jury on the law of self-defense and that defendant was entitled to this defense if the evidence supported such. *Ellis v. State*, 956 So. 2d 1008 (Miss. Ct. App. 2007), writ of certiorari dismissed by 973 So. 2d 244, 2007 Miss. LEXIS 687 (Miss. 2007).

23. — Lesser offense.

When defendant was charged with aggravated assault, pursuant to Miss. Code Ann. § 97-3-7(2)(b), a circuit court properly refused defendant's request for a jury instruction on the lesser-included offense of simple assault, § 97-3-7(1)(a), because there was no evidentiary basis justifying an instruction on simple assault given the severity of the victim's injuries and the extensive treatment required to repair those injuries; the fractures to the victim's face required the insertion of 5 plates and 22 screws, and the victim's broken jaw had to be wired shut for 2 weeks. *Jones v. State*, 64 So. 3d 1033 (Miss. Ct. App. 2011).

Had defendant presented testimony or any evidence that the victim's injuries were not serious, then a simple assault instruction may have been warranted; however, defendant presented no such evidence, and the circuit court did not err in determining that the severity of the victim's injuries would not have supported a conviction of simple assault. *Ames v. State*, 17 So. 3d 130 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 433 (Miss. 2009).

Jury instruction as to simple assault was not warranted where no reasonable juror could find defendant guilty of simple assault against the law enforcement officer or that the incident was an accident; nothing in the record suggested that defendant did not knowingly or purposely pull a knife on the deputies. *Babb v. State*, 17 So. 3d 100 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 440 (Miss. 2009).

In a case in which defendant was convicted of violating Miss. Code Ann. § 97-3-7(2)(b), the trial judge did not err by refusing to grant a simple assault jury instruction. Defendant contended that a lesser-included-offense instruction should have been given for the jury to consider simple assault, but the trial judge found that the evidence did not support simple assault. *Carter v. State*, 995 So. 2d 847 (Miss. Ct. App. 2008).

In an aggravated assault case, the trial court did not err in refusing a jury instruction on the lesser-included offense of simple assault as it was undisputed that

defendant intentionally stabbed the victim, and there was no evidence that defendant acted negligently. *Ford v. State*, 975 So. 2d 859 (Miss. 2008).

Circuit court erred when it declined to instruct the jury on the lesser-included offense of simple assault where, pursuant to Miss. Code Ann. § 97-3-7(1)(a), viewing the testimony in a light most favorable to defendant, it was clear that, given the option, reasonable jurors could find defendant guilty of simple assault and not guilty of aggravated assault under Miss. Code Ann. § 97-3-7(2)(b). *Booze v. State*, 964 So. 2d 1218 (Miss. Ct. App. 2007).

Because defendant's actions clearly arose to an aggravated assault, the evidence did not support the giving of a lesser-included offense instruction on simple assault; the evidence showed that defendant caused serious bodily injury under such circumstances manifesting extreme indifference to the value of human life. *Downs v. State*, 962 So. 2d 1255 (Miss. 2007).

In a case where defendant was charged with aggravated assault after he stabbed several victims during a drunken fight, he was not entitled to an instruction on simple assault because he yielded a dangerous weapon and intentionally struck at the victims; the case was distinguished from others where mere negligent use of a weapon was shown. *Lackie v. State*, 971 So. 2d 601 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2007 Miss. LEXIS 683 (Miss. 2007).

In an aggravated assault case, a trial court did not err by failing to instruct the jury on several lesser included offenses, which included simple assault, simple domestic violence assault, and aggravated domestic violence, because they were not requested. *Ellis v. State*, 956 So. 2d 1008 (Miss. Ct. App. 2007), writ of certiorari dismissed by 973 So. 2d 244, 2007 Miss. LEXIS 687 (Miss. 2007).

Lesser-included offense instruction was not warranted where the record contained no evidence which supported simple assault as no evidence was presented that showed the victim's injuries to be less than serious; given the severity and the extensive treatment necessary to repair the injuries, and the fact that the injuries

were serious, a lesser-included offense instruction was not required. *Brown v. State*, 934 So. 2d 1039 (Miss. Ct. App. 2006).

Under simple assault under Miss. Code Ann. § 97-3-7(1)(b), defendant had to have acted negligently, but there was no evidence in the record that defendant acted negligently as the victim was stabbed six times, and defendant admitted that he swung at the victim with a knife; defendant claimed that he was acting in self-defense and a self-defense jury instruction was given, but defendant was not entitled to a lesser-included offense jury instruction on simple assault. *Grubbs v. State*, 956 So. 2d 932 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 313 (Miss. 2007).

In an aggravated assault with a weapon case, Miss. Code Ann. § 97-3-7(2)(b), no reasonable juror could have believed that defendant was only guilty of simple assault under § 97-3-7(1)(a); thus, because the uncontradicted physical facts so overwhelmingly supported a finding of aggravated assault and rendered so unreasonable the suggestion that defendant might have been guilty only of simple assault, the trial court did not err in not instructing the jury on the lesser-included offense of simple assault. *Grubbs v. State*, 956 So. 2d 932 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 313 (Miss. 2007).

25. Conviction of lesser crime.

When a jury found defendant guilty of resisting arrest, but acquitted him of the charge of aggravated assault on a police officer, the verdict was not necessarily inconsistent because, among other things, the record showed that defendant struck an officer in the chest when the officer tried to arrest defendant. *Chambers v. State*, — So. 2d —, 2007 Miss. App. LEXIS 108 (Miss. Ct. App. Feb. 27, 2007), opinion withdrawn by, substituted opinion at 973 So. 2d 266, 2007 Miss. App. LEXIS 692 (Miss. Ct. App. 2007).

26. Sentence.

In a case in which defendant appealed his conviction for violating Miss. Code Ann. § 97-3-7(2)(a), he unsuccessfully ar-

gued that his 15-year sentence was unreasonable. Since his sentence was within the statutory range of one year to 20 years provided for in § 97-3-7(2)(a), there was no basis for finding that it was excessive. *David v. State*, 29 So. 3d 129 (Miss. Ct. App. 2010).

Trial court did not err in dismissing an inmate's petition alleging that the Mississippi Department of Corrections improperly computed his discharge date and that he had to be released from prison because the inmate was not entitled to any earned-time credit, and his time had been properly computed; because Miss. Code Ann. § 99-19-81 clearly stated that a habitual offender's sentence would not be reduced, the inmate was required to serve the maximum term of imprisonment for his crime of aggravated assault of a law enforcement officer, which was thirty years' imprisonment, Miss. Code Ann. § 97-3-7(2), and was the sentence that the inmate received. *Lee v. Kelly*, 34 So. 3d 1203 (Miss. Ct. App. 2010).

Where a defendant pleaded guilty to aggravated assault under Miss. Code Ann. § 97-3-7(2) and armed robbery under Miss. Code Ann. § 97-3-79 and was sentenced to consecutive incarcerations of 30 years for the robbery and 10 years for the assault, the trial court properly (1) summarily dismissed the defendant's petition for postconviction relief from the sentence without holding an evidentiary hearing because the defendant was aware that the trial court was not required to follow the State's recommended sentence, and the sentence imposed by the trial court was within statutory guidelines; or (2) finding that the defendant's plea was voluntary because the defendant had read and understood his guilty plea petition, which stated that the trial judge was not required to follow the State's sentencing recommendation. *Owens v. State*, 996 So. 2d 85 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 685 (Miss. 2008), writ of certiorari denied by 556 U.S. 1212, 129 S. Ct. 2060, 173 L. Ed. 2d 1140, 2009 U.S. LEXIS 3181, 77 U.S.L.W. 3595 (2009).

Where defendant was convicted of aggravated assault after he and a cohort approached a home, shot two victims, and

fled the scene, his sentence of twenty years' was within the statutory limitations set forth in Miss. Code Ann. § 97-3-7(2)(b). Defendant failed to prove that the sentence was unconstitutional, because it did not punish him for exercising his right to trial nor was the sentence disproportionate to his role in the crime. *Hughes v. State*, 983 So. 2d 270 (Miss. 2008), writ of certiorari denied by 555 U.S. 1052, 129 S. Ct. 633, 172 L. Ed. 2d 620, 2008 U.S. LEXIS 8544, 77 U.S.L.W. 3324 (2008).

In an aggravated assault case, defendant's 17-year sentence did not violate her right to a trial by jury because it was not beyond the prescribed statutory maximum. Although 17 years was a severe sentence, it did not lead to an inference of "gross disproportionality"; aggravated assault with a deadly weapon was a serious, violent crime, and a sentence of 17 years did not meet the threshold requirement for Solem proportionality review. *Ford v. State*, 975 So. 2d 859 (Miss. 2008).

Defendant's sentence after she was convicted of aggravated assault was appropriate because it was not grossly disproportionate to the crime committed and the sentence of 15 years, with 10 to serve and five years of post-release supervision was well within the statutory guidelines set forth in Miss. Code Ann. § 97-3-7(2); additionally, the trial court noted that aggravated assault was a serious crime and the trial court considered the fact that defendant had a relatively clean record and had been consistently employed. *White v. State*, 958 So. 2d 290 (Miss. Ct. App. 2007).

Motion for post-conviction relief was summarily dismissed since defendant, who was 65 years old and had no prior record, was unable to show that his sentences for burglary and aggravated assault, which were within the ranges in Miss. Code Ann. § 97-17-23 and Miss. Code Ann. § 97-3-7 were grossly disproportionate; he could have received 45 years if the maximum terms had been run consecutively, and the facts showed that he broke into a house wielding a pistol and beat a victim. *Denton v. State*, 955 So. 2d 398 (Miss. Ct. App. 2007).

Where appellant entered a plea of guilty to aggravated assault in violation of Miss.

Code Ann. § 97-3-7(2), he was sentenced to 17 years in the custody of the Mississippi Department of Corrections, with 12 years to serve and five years suspended; as part of his sentence, he was also placed on five years of supervised probation upon his release. *Barnes v. State*, 949 So. 2d 879 (Miss. Ct. App. 2007).

28. Miscellaneous.

Trial court did not err in denying an inmate's motion for post-conviction relief because the record contained sufficient evidence that the inmate pleaded guilty to culpable-negligence manslaughter, Miss. Code Ann. § 97-3-47, and aggravated assault, Miss. Code Ann. § 97-3-7, with knowledge and understanding of the elements of each crime when the prosecutor's on-the-record statement reiterated the charging language in the indictment and evinced an accurate showing that the inmate was informed of the essential elements of the crimes; factual bases existed for the pleas because there was substantial evidence that the inmate committed the crimes. and through his plea petitions, the inmate was specifically informed of the statutory maximum and minimum punishment that each crime carried. *Williams v. State*, 31 So. 3d 69 (Miss. Ct. App. 2010).

In a divorce action, the chancellor's award of two pistols to the wife was improper because it appeared that 18 U.S.C.S. § 922(g)(9) made the wife's possession of a firearm under particular circumstances illegal, Miss. Code Ann. § 97-3-7(3). Thus, a remand to the chancellor was necessary for the reconsideration of the distribution of the firearms owned by the parties in light of 18 U.S.C.S. § 922(g)(9). *Smith v. Smith*, 994 So. 2d 882 (Miss. Ct. App. 2008).

Trial court did to err in denying a motion for a directed verdict, for a judgment notwithstanding the verdict, or for a new trial because while defendant may have offered evidence and testimony tending to show that the shooting was accidental, the State clearly presented evidence demonstrating that the shooting amounted to aggravated assault under Miss. Code Ann. § 97-3-7(2)(b). The State presented a 911 transcript showing that defendant was the aggressor and testimony showing that

the victim was injured by a gunshot wound to the head. *Christian v. State*, 998 So. 2d 1019 (Miss. Ct. App. 2008).

Fact that a debtor was convicted of simple assault under Miss. Code Ann. § 97-3-7 did not preclude the debtor from challenging the claim of non-dischargeability under 11 U.S.C.S. § 523(a)(3) in a bankruptcy court proceeding. *Berry v. Vollbracht* (In re Vollbracht), — Bankr. —, 2008 Bankr. LEXIS 1044 (Bankr. N.D. Miss. Mar. 20, 2008).

Even if a verdict finding defendant guilty of resisting arrest was inconsistent with a verdict of not guilty of simple assault on a police officer, that inconsistency was not grounds for reversal as the evidence was sufficient to sustain the re-

sisting arrest conviction; an officer testified that after defendant struck another officer in the chest, a “fierce struggle” ensued while officers attempted to place defendant in handcuffs. *Chambers v. State*, 973 So. 2d 266 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 244, 2007 Miss. LEXIS 699 (Miss. 2007).

In an aggravated assault case, a motion for a new trial was not warranted because the guilty verdict was not against the overwhelming weight of the evidence where the jury heard the two versions of events relating to a shooting, including witnesses who helped the victim and defendant’s alibi witness. *Parks v. State*, 950 So. 2d 184 (Miss. Ct. App. 2006).

ATTORNEY GENERAL OPINIONS

If an individual has two convictions for simple domestic violence, and within the five year time frame, commits an offense which would be an aggravated domestic, it is within the discretion of the prosecutor whether to seek prosecution for a third simple domestic or for a first aggravated domestic. Garber, Apr. 29, 2005, A.G. Op. 05-0205.

Under Section 97-3-7(4), any conviction of aggravated domestic violence is a felony, and as such is punishable in the same manner as a non-domestic aggravated assault conviction pursuant to Section 97-3-7(2). Garber, Apr. 29, 2005, A.G. Op. 05-0205.

There is no requirement that an individual be convicted of a “first” or “second” simple domestic violence before being charged with a felony third. It is sufficient that the offender have been convicted twice of simple domestic violence within the five year time frame of when the third offense is charged. Garber, Apr. 29, 2005, A.G. Op. 05-0205.

If a person is granted bail by a municipal court on a charge of aggravated assault and while out on bail a justice court finds probable cause that the person has committed commercial burglary, the justice court should revoke bail for the aggravated assault charge and shall order the person detained, without bail, on the commercial burglary charge, pending trial on the aggravated assault charge. Turnage, June 26, 2006, A.G. Op. 06-0246.

The Court hearing a domestic violence charge could prohibit the defendant from possessing a handgun if, pursuant to Miss. Code Ann. § 93-21-11, the Court deems it necessary to protect the victim(s). Where a handgun was stolen from the defendant, recovered by a Police Department, and its return was requested by the defendant, the Department may ask the Court for such an order and if granted, may refuse to return the handgun to the defendant. Dawson, Jr., March 9, 2007, A.G. Op. #07-00101, 2007 Miss. AG LEXIS 89.

RESEARCH REFERENCES

ALR. Cigarette Lighter as Deadly or Dangerous Weapon. 22 A.L.R. 6th 533.

§ 97-3-13. False confinement; sending sane person to psychiatric hospital or institution.

Every person or officer who maliciously sends to or confines in a psychiatric hospital or institution or other place, any sane person as a person with mental illness, knowing the person to be sane, shall be guilty of a felony, and, on conviction, shall be punished by a fine of not more than Five Hundred Dollars (\$500.00), or by imprisonment in the Penitentiary not more than one (1) year, or in the county jail not more than six (6) months.

SOURCES: Codes, 1892, § 1316; 1906, § 1390; Hemingway's 1917, § 1133; 1930, § 1164; 1942, § 2407; Laws, 2008, ch. 442, § 32, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment substituted “a psychiatric hospital or institution” for “asylum, mad-house” and “person with mental illness” for “lunatic or insane person”; and made a minor stylistic change.

§ 97-3-15. Homicide; justifiable homicide; use of defensive force; duty to retreat.

JUDICIAL DECISIONS

4. Self-defense; generally.
5. —Evidence.
7. Instructions; generally.
8. —Self-defense.
10. —Defense of property.
11. —Justification.

4. Self-defense; generally.

Court rejected defendant's claim of ineffective assistance of counsel; because the defense was that defendant killed the victim in self-defense, counsel's statement conceding that defendant killed the victim was a tactical decision. *Ray v. State*, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

5. —Evidence.

Defendant's manslaughter conviction, pursuant to Miss. Code Ann. § 97-3-35, was supported by sufficient evidence because both versions of the shooting in evidence at trial supported the conclusion that defendant's use of deadly force was either unnecessary or premature and was not exercised in necessary self-defense, as defined in Miss. Code Ann. § 97-3-15(f). *Pruitt v. State*, 28 So. 3d 585 (Miss. 2010).

Verdict of murder under Miss. Code Ann. § 97-3-19 was not against the over-

whelming weight of the evidence as the testimony presented a factual dispute for the jury's resolution and the jury found certain testimony to be credible and defendant's attempts to establish a self-defense theory to be contradictory; although defendant cited to Miss. Code Ann. § 97-3-31, which provided for a manslaughter conviction when one killed another while resisting a felony, there was conflicting testimony as to whether the victim was attempting to commit a felony, and although defendant also cited to Miss. Code Ann. § 97-3-35 and claimed the evidence supported a heat of passion manslaughter conviction, there was no evidence that defendant was acting in a state of violent and uncontrollable rage and he only attempted to show that he was afraid of the victim and acted in self-defense. *Ray v. State*, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Defendant's conviction for manslaughter was proper because it was up to the jury to determine whether defendant acted reasonably in necessary self-defense when he shot the victim in the head. The jury could have determined that defen-

dant did not act in necessary self-defense because, at that time, the victim was on the floor and did not present a reasonable threat to defendant's life. *Rogers v. State*, 994 So. 2d 792 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 668 (Miss. 2008).

Two defendants' convictions for depraved-heart murder were appropriate because there was sufficient evidence that the first defendant acted without authority of law since there was testimony that the victim made no physical or verbal threats against the second defendant, Miss. Code Ann. § 97-3-15(1)(f); witnesses also did not see the victim brandish his knife against that defendant. *McDowell v. State*, 984 So. 2d 1003 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 328 (Miss. 2008).

Sufficient evidence was adduced at trial to support a finding that defendant's murder of the victim was not done in self-defense, even though defendant testified that the victim had previously choked defendant, to the point that defendant felt that he was going to die; the evidence was sufficient for a reasonable jury to find defendant guilty of manslaughter. *Harris v. State*, 937 So. 2d 474 (Miss. Ct. App. 2006).

7. Instructions; generally.

8. —Self-defense.

Defendant's murder conviction was appropriate because the trial court did not err in refusing to give a self-defense instruction under Miss. Code Ann. § 97-3-15(1)(f) since there was no testimony introduced that defendant thought that he was in imminent danger. *Whittington v. State*, 49 So. 3d 107 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 636 (Miss. 2010).

Court rejected as without merit defendant's claim that the trial court erred in failing to grant his motion for a judgment notwithstanding the verdict, given that the jury was instructed to consider

whether the victim's killing was murder, manslaughter, or committed in self-defense and the jury had sufficient evidence to convict defendant of murder; although defendant argued that the facts supported either excusable or justifiable homicide, the facts were conflicting and created a jury question, as testimony and physical evidence contradicted defendant's testimony that the victim backed him up steps and defendant having left the scene immediately after the stabbing created the impression that he knew the victim was no longer a threat. *Ray v. State*, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

10. —Defense of property.

Evidence established the elements of murder beyond a reasonable doubt; appellant armed himself with a baseball bat with the intent to cause serious bodily injury or death to the victim and struck an unarmed victim in the head three times with the baseball bat, the first of which would have knocked him unconscious and defenseless. These actions resulted in the victim's death; the victim was not in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered the business when appellant began attacking the victim. *Westbrook v. State*, 29 So. 3d 828 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 29 So. 3d 774, 2010 Miss. LEXIS 124 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 98, 178 L. Ed. 2d 62, 2010 U.S. LEXIS 5934, 79 U.S.L.W. 3197 (U.S. 2010).

11. — Justification.

In defendant's prosecution on a charge of manslaughter, the trial court improperly refused defendant's instruction on justification that included a right to use deadly force: (1) to resist commission of a felony; (2) to protect his son; and (3) to protect himself from a group of men surrounding his car. The instruction correctly stated the law, had a foundation in evidence, and was not otherwise covered. *Ford v. State*, 52 So. 3d 1245 (Miss. Ct. App. 2011).

§ 97-3-17. Homicide; excusable homicide.

JUDICIAL DECISIONS

1. In general.
2. Killing by accident or misfortune.
4. Instructions to jury.
5. Applicability to assault.

1. In general.

According to Miss. Code Ann. § 97-3-17(a), a homicide may be excused when committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent. By extension, it follows that the same principles should apply to make an assault that does not result in death excusable under the same circumstances. *Rogers v. State*, 994 So. 2d 792 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 668 (Miss. 2008).

2. Killing by accident or misfortune.

Defendant's manslaughter conviction was proper because the circuit court did not err when it refused a proffered instruction since, whether the victim was the initial aggressor was a question of fact for the jury to resolve; moreover, there was no evidence that the victim died as a result of a "tragic accident." Defendant deliberately grabbed the victim's wrist, intentionally struck the victim in the face three times, and it was only the victim's subsequent death that defendant did not intend; such an intentional act followed by an unintended consequence could not serve as a basis for excusable homicide, accident, and misfortune. *Booker v. State*, 64 So. 3d 988 (Miss. Ct. App. 2010), affirmed by 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Court rejected as without merit defendant's claim that the trial court erred in failing to grant his motion for a judgment notwithstanding the verdict, given that the jury was instructed to consider whether the victim's killing was murder, manslaughter, or committed in self-defense and the jury had sufficient evidence to convict defendant of murder; although defendant argued that the facts supported either excusable or justifiable homicide,

the facts were conflicting and created a jury question, as testimony and physical evidence contradicted defendant's testimony that the victim backed him up steps and defendant having left the scene immediately after the stabbing created the impression that he knew the victim was no longer a threat. *Ray v. State*, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

4. Instructions to jury.

In defendant's prosecution on a charge of manslaughter, the trial court correctly denied an instruction on excusable homicide as the evidence showed that defendant's act of shooting the victim was an intentional act; thus, the instruction on accidental killing did not apply to the facts of the case. *Ford v. State*, 52 So. 3d 1245 (Miss. Ct. App. 2011).

In a murder case, the trial court correctly denied defendant's jury instruction because defendant's theory of the case was based upon his own testimony that he intentionally fired each shot, and there was no evidence from which a jury could have found that he fired the shots accidentally. Further, there was sufficient evidence to find that defendant shot into the trailer house with a deliberate design to kill; although there was sufficient evidence that defendant had a deliberate design to kill his brother, defendant's intent to kill his brother was transferred to the sister-in-law, the actual victim. *Walden v. State*, 29 So. 3d 17 (Miss. Ct. App. 2008), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 105 (Miss. 2010).

Where a defendant was convicted of manslaughter in the shooting death of his wife, the trial court erred when it denied defendant's request to present a theory of the defense instruction; the denial of this fundamental right was reversible error. *Chinn v. State*, 958 So. 2d 1223 (Miss. 2007).

5. Applicability to assault.

Defendant's convictions for aggravated assault were inappropriate because the

undisputed evidence showed that he was acting in necessary self-defense when the projectiles from his firearm struck the bystanders that led to his two aggravated assault convictions. The same principles contained in Miss. Code Ann. § 97-3-17

were applicable to make an assault that did not result in death excusable. *Rogers v. State*, 994 So. 2d 792 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 668 (Miss. 2008).

§ 97-3-19. Homicide; murder defined; capital murder; lesser-included offenses.

JUDICIAL DECISIONS

I. IN GENERAL.

1. In general.
2. Definitions and distinctions.
3. Plea.
4. Sentence.
7. Practice and procedure.
8. Deliberate design; malice.
11. Provocation.
12. Defenses; generally.
13. —Self-defense.
16. Killing of one other than person intended.
18. Homicide by persons joining in commission of felony.
19. Homicide by commission of dangerous act.
20. Killing as manslaughter.
21. Indictment.
24. Conviction of lesser offense.
25. Trial; generally.
26. —Prosecutorial misconduct.
28. —Ineffective assistance of counsel.
29. —Continuance.
30. Prejudicial or harmless error; generally.
32. —Instructions.

II. EVIDENTIARY MATTERS.

- 33.5 — Death certificate.
34. Evidence; generally.
35. Witnesses—defendant as only witness to offense.
37. Admissibility; generally.
39. —Admissions; confessions.
41. —Photographs, other prejudicial evidence.
42. — —Photographs as admissible.
43. —Expert testimony; scientific techniques.
48. Insanity.
49. Sufficiency of evidence; generally.

50. — Conviction sustained — murder.
51. — — Capital murder.

III. INSTRUCTIONS.

53. In general.
- 53.5. Variance between pleadings and instructions.
- 54.5 Lesser included offenses.
- 54.6 — — Depraved heart murder.
55. Failure to give manslaughter instruction—where accused fails to request.
57. —Where evidence does not support manslaughter.
61. Accessories, accomplices.
63. Peremptory instructions.
64. Defendant's theory of defense.
66. Malice or deliberate design.
67. Self-defense.
68. Miscellaneous.
71. Instructions properly denied.

I. IN GENERAL.

1. In general.

Double jeopardy did not bar defendant's prosecution for murder, Miss. Code Ann. § 97-3-19(2)(e), and kidnapping, Miss. Code Ann. § 97-3-53, because murder and kidnapping had separate statutory elements, requiring different facts. *McBeath v. State*, 66 So. 3d 663 (Miss. Ct. App. 2010), writ of certiorari denied by 69 So. 3d 9, 2011 Miss. LEXIS 373 (Miss. 2011).

Defendant's capital murder conviction under Miss. Code Ann. '97-3-19(2)(e) was reversed where his indictment was insufficient to charge him with capital murder or burglary because it failed to assert the underlying offense that comprised the burglary; it also failed to charge him with murder or manslaughter where it omitted the term "unlawfully" or the phrase "with-

out the authority of law.” *Jackson v. State*, — So. 3d —, 2010 Miss. LEXIS 170 (Miss. App. 1, 2010).

2. Definitions and distinctions.

Although depraved-heart murder and culpable-negligence manslaughter share some elements, they are separate crimes with differing states of culpability; depraved-heart murder involves a higher degree of recklessness from which malice of deliberate design may be implied. *Nichols v. State*, 27 So. 3d 433 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 70 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 97, 178 L. Ed. 2d 61, 2010 U.S. LEXIS 5836, 79 U.S.L.W. 3197 (U.S. 2010).

Miss. Code Ann. § 97-3-19(2)(e) did not address whether the victim in a felony-murder case had to be innocent as it simply stated that capital murder was the killing of a human being without authority of law by any means or in any manner when committed, regardless of intent, by a person engaged in one of several enumerated felonies; robbery was one of the enumerated felonies, and the jury found that defendant killed the victim during the commission of a robbery. *Grant v. State*, 8 So. 3d 213 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 207 (Miss. 2009).

Defendant's prosecutions for both shooting into a vehicle under Miss. Code Ann. § 97-25-47 and murder under Miss. Code Ann. § 97-3-19(1)(a), did not subject him to double jeopardy since the crimes charged required additional facts separate from each other; murder, unlike shooting into a vehicle, required the deliberate killing of an individual and did not require defendant to have shot into a vehicle, while shooting into a vehicle required only that defendant willfully shot into or at a vehicle. Further, the facts were such that it was not clear whether defendant shot into the vehicle when he killed the victim, as there was testimony to the effect that the victim may have had all or part of his head outside the vehicle when he was shot; in essence, the facts were such that defendant could have been found guilty of murder and of shooting into a vehicle without any risk of exposure

to double jeopardy. *Peacock v. State*, 970 So. 2d 197 (Miss. Ct. App. 2007).

3. Plea.

Defendant was not entitled to post-conviction relief because the motion was filed outside of the three-year limitation of Miss. Code Ann. § 99-39-5(2) and when defendant pled guilty to murder in violation of Miss. Code Ann. § 97-3-19(1)(a), defendant stated that he understood the nature of the charge, the elements of the crime, and the consequences of pleading guilty to such a crime; thus, defendant was sufficiently informed of the elements of murder and the consequences of pleading guilty to such a crime to make defendant's guilty plea intelligent and voluntary. *Shanks v. State*, 972 So. 2d 734 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2008 Miss. LEXIS 24 (Miss. 2008).

4. Sentence.

In a post-conviction relief proceeding in which a pro se state inmate had been indicted for capital murder and pled guilty to the reduced charge of murder, in violation of Miss. Code Ann. § 97-3-19(1)(a), the only exception that he alleged allowed him to file a successive writ was the existence of an intervening decision. With regard solely to his proposed unconstitutional life sentence, he argued that the *Apprendi* decision and the *Blakely* decision satisfied the intervening-decision exception; however, those decisions did not provide any support for his claim since life was the only sentence available under Miss. Code Ann. § 97-3-21. *Glass v. State*, 45 So. 3d 1200 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 636, 2010 Miss. LEXIS 554 (Miss. 2010).

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), nothing in the record supported a finding that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. The findings by the trial judge were supported by the record, and upon comparison to other factually similar cases where the death sentence was imposed, the sentence of death was not disproportionate in the present case. *Wilson v. State*, 21 So. 3d

572 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (U.S. 2010).

Defendant asserted that he was improperly sentenced to life imprisonment without the possibility of parole for murder; however, that was the sentence for capital murder. Because defendant was only sentenced to life imprisonment, not to life without the possibility of parole, under Miss. Code Ann. § 97-3-21, defendant's sentence for murder under Miss. Code Ann. § 97-3-19(1) was proper. *Staten v. State*, 989 So. 2d 938 (Miss. Ct. App. 2008), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 400 (Miss. 2008).

Inmate's claim that when reading Miss. Code Ann. § 97-5-39(2)(c) in conjunction with Miss. Code Ann. § 97-3-19(2)(f), the result was an automatic implication of a capital crime regardless of how or in what manner the child suffered death, was procedurally barred under Miss. Code Ann. § 99-39-21(1) because it could have been raised on direct appeal and was not; the claim was also without merit because the Mississippi Supreme Court had previously found that upon reading the statutes in conjunction that they were constitutional. *Brawner v. State*, 947 So. 2d 254 (Miss. 2006), dismissed by 2010 U.S. Dist. LEXIS 7487 (N.D. Miss. Jan. 27, 2010).

7. Practice and procedure.

A murder indictment which stated that the defendant, "willfully, and feloniously, with the deliberate design to effect the death" of the two victims, killed them by "suffocation," sufficiently notified defendant of the charges against her, even though expert testimony established the victims died of strangulation, which is not exactly synonymous with suffocation; the purpose of the indictment is to give the accused notice and a reasonable description of the charges, to enable her to prepare a defense, and there is no requirement that it set forth the means of the victims' death. *Blakeney v. State*, — So. 3d —, 2009 Miss. App. LEXIS 887 (Miss. Ct. App. Dec. 8, 2009), opinion withdrawn by, substituted opinion at 2009 Miss. App. LEXIS 978 (Miss. Ct. App. Dec. 8, 2009).

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), he argued his lawyer's ineffective assistance prevented him from receiving the benefit of the plea agreement with the State, which would have resulted in a sentence of life imprisonment rather than death. That issue was better suited for future post-conviction-relief proceedings commenced pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. §§ 99-39-1 to 99-39-29. *Wilson v. State*, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (U.S. 2010).

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), he argued unsuccessfully that the trial court abused its discretion and arbitrarily refused to accept the first guilty plea, thus preventing him from accepting the plea-bargain agreement for life imprisonment. Given that defendant had no absolute right to have his plea accepted and given that the trial judge did not accept the plea due to his expressed dissatisfaction with appointed counsel, defendant's argument that his plea was arbitrarily rejected was without merit. *Wilson v. State*, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (U.S. 2010).

It was proper, under the Eighth Amendment, for an aggravating circumstance in a capital case to duplicate an element of the capital crime of conviction, specifically rape as set forth in Miss. Code Ann. § 97-3-19(2)(e). *Holland v. Anderson*, 583 F.3d 267 (5th Cir. 2009), writ of certiorari denied by 130 S. Ct. 2100, 176 L. Ed. 2d 731, 2010 U.S. LEXIS 3429, 78 U.S.L.W. 3610 (U.S. 2010).

Federal court's denial of habeas corpus under 28 U.S.C.S. § 2254 to an inmate convicted of capital murder pursuant to Miss. Code Ann. § 97-3-19(2)(e) was proper because there was a clear split among federal courts as to whether there was a constitutional right to present evi-

dence of innocence at sentencing when such evidence would contravene prior guilty adjudication. *Holland v. Anderson*, 583 F.3d 267 (5th Cir. 2009), writ of certiorari denied by 130 S. Ct. 2100, 176 L. Ed. 2d 731, 2010 U.S. LEXIS 3429, 78 U.S.L.W. 3610 (U.S. 2010).

Denial of petitioner state death row inmate's motion for severance did not violate his Fifth Amendment rights because Miss. Code Ann. § 99-7-2 allowed for joinder of the four counts of capital murder under Miss. Code Ann. § 97-3-19(2) and the state did not tie a weak case to a stronger one; the evidence against the inmate in each count was roughly the same and overwhelming, and it was not likely that four different juries would have returned different verdicts. *Stevens v. Epps*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), affirmed by 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

Defendant's convictions for murder and for shooting into an occupied dwelling did not violate the double jeopardy clause of the Fifth Amendment. In order to convict defendant for shooting into an occupied dwelling, the State was required to prove that defendant shot into a dwelling house, but no such showing was required to convict defendant under the felony-murder statute. *Boyd v. State*, 977 So. 2d 329 (Miss. 2008).

8. Deliberate design; malice.

Evidence was sufficient to support defendant's conviction for murder as defendant admitted that he shot the victim in one typewritten statement, indicating that he and the victim got into an argument, that he worked on a puzzle, that he then walked over to a cabinet where he retrieved his pistol, and that he proceeded to the bedroom where he shot the victim in the neck. In a second handwritten statement defendant admitted that he shot the victim during an argument over her taking his pills; thus, these statements strongly supported the State's position that defendant acted with deliberate design. *Adams v. State*, 62 So. 3d 432 (Miss. Ct. App. 2011).

Defendants' murder convictions were appropriate under Miss. Code Ann. § 97-3-19(1)(a) because the evidence showed

the intent of three defendants to kill the victim; all defendants joined together once one defendant found out that his mother had been in an altercation with the victim and the group went together to the victim's apartment where they waited for the victim. Then, one defendant punched the victim and everyone in the group kicked the victim. *Sneed v. State*, 31 So. 3d 33 (Miss. Ct. App. 2009), writ of certiorari denied by 2010 Miss. LEXIS 150 (Miss. Mar. 25, 2010), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 152 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 931, 178 L. Ed. 2d 775, 2011 U.S. LEXIS 350, 79 U.S.L.W. 3400 (U.S. 2011).

Defendant's conviction for murder under Miss. Code Ann. § 97-3-19(1)(a) was affirmed because a rational jury could find that defendant possessed the deliberate design required for murder based on defendant's statement to interrogating officers, the eyewitnesses' testimonies, and the autopsy results which materially contradicted defendant's version of the killing. *Griffin v. State*, 13 So. 3d 833 (Miss. Ct. App. 2009).

Petitioner state death row inmate's argument that the charge of murder for each victim was enhanced by underlying offenses that used murder as an element, thus violating the Double Jeopardy Clause of the Fifth Amendment, was rejected because Miss. Code Ann. § 97-3-19(1), described murder to include killing with deliberate design to effect the death of the person killed, and in Miss. Code Ann. § 97-3-19(2)(e) defined capital murder as including such a killing when done without any design to effect death by any person engaged in the commission of the crime of felonious child abuse and/or battery of a child in violation Miss. Code Ann. § 97-5-39(2) and child abuse, as had been alleged in the indictment, was not so much an "underlying felony" as an element of the offense of capital murder, thus, the merger doctrine did not really apply. *Stevens v. Epps*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), affirmed by 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

When considering the evidence in the light most favorable to the state, a ratio-

nal juror could conclude that defendant acted not out of the heat of passion, but with deliberate design to kill the victim where the evidence showed that defendant repeatedly hit the victim with multiple bricks, that defendant struck the victim from behind, that the victim had no defensive wounds on his hands, and that defendant had plenty of time to contemplate hitting the victim; thus, a jury could find that defendant acted with deliberate design. *Givens v. State*, 967 So. 2d 1 (Miss. 2007).

Sufficient evidence existed to convict defendant of depraved heart murder in violation of Miss. Code Ann. § 97-3-19(1)(a) and (b) because, at the very least, defendant shot into a home where people were present. *Chatman v. State*, 952 So. 2d 945 (Miss. Ct. App. 2006), writ of certiorari denied by 951 So. 2d 563, 2007 Miss. LEXIS 532 (Miss. 2007).

11. Provocation.

Weight of the evidence did not support a manslaughter conviction rather than a murder conviction because defendant failed to detail what he considered “sufficient provocation,” and his sister testified that the victim had gotten up and had began walking into the kitchen when defendant ran and grabbed the victim from behind. There was no testimony that the victim had a weapon and there was no testimony that defendant had to use deadly force under the circumstances. *Ravencraft v. State*, 989 So. 2d 437 (Miss. Ct. App. 2008).

Defendant’s murder conviction in violation of Miss. Code Ann. § 97-3-19 was proper because, although the victim’s comments might have been crude and insulting, mere words, no matter how provocative, were insufficient to reduce an intentional and unjustifiable homicide from murder to manslaughter. *Booze v. State*, 942 So. 2d 272 (Miss. Ct. App. 2006).

12. Defenses; generally.

In defendant’s capital murder case, he was not entitled to an instruction that duress was a defense to the underlying felony of kidnapping because defendant never indicated that the victim had threatened him or had done anything in

particular to cause a well-founded fear of death or serious bodily injury. Moreover, on at least two occasions—once at the home and once at the cornfield—defendant actually possessed the gun; additionally, defendant could have attempted to renounce any further participation in the crime, and joined the other occupants at the back of the home. *Ruffin v. State*, 992 So. 2d 1165 (Miss. 2008).

13. —Self-defense.

Defendant’s conviction for murder under Miss. Code Ann. § 97-3-19(1)(b) was proper, in part because the jury was properly instructed regarding the State’s burden to prove that defendant did not act in self-defense. In part, because defendant, not the State, requested jury instruction D-1, defendant was unable to complain on appeal that the instruction was erroneous; further, jury instruction S-6 cited the appropriate standard regarding reasonableness. *Franklin v. State*, 72 So. 3d 1129 (Miss. Ct. App. 2011), writ of certiorari denied by 71 So. 3d 1207, 2011 Miss. LEXIS 508 (Miss. 2011).

Defendant’s conviction for murder under Miss. Code Ann. § 97-3-19(1)(b) was proper, in part because evidence was presented to show that defendant and the victim had gotten into an altercation earlier that evening, which resulted in gunfire. It was the jury’s province to consider the evidence and determine whether defendant shot the victim in self-defense. *Franklin v. State*, 72 So. 3d 1129 (Miss. Ct. App. 2011), writ of certiorari denied by 71 So. 3d 1207, 2011 Miss. LEXIS 508 (Miss. 2011).

Even though he contended that he shot her in self-defense, the evidence was sufficient to convict defendant of murder under Miss. Code Ann. § 97-3-19(1)(a) (2006) because there was sufficient contradictory evidence from which a reasonable juror could have rejected this claim, including testimony from a neighbor, who heard an altercation, and testimony from a friend, who averred that defendant stated he intended to kill his girlfriend due to her infidelity. *Reed v. State*, 31 So. 3d 48 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 151 (Miss. 2010).

16. Killing of one other than person intended.

In a murder case, the trial court correctly denied defendant's jury instruction because defendant's theory of the case was based upon his own testimony that he intentionally fired each shot, and there was no evidence from which a jury could have found that he fired the shots accidentally. Further, there was sufficient evidence to find that defendant shot into the trailer house with a deliberate design to kill; although there was sufficient evidence that defendant had a deliberate design to kill his brother, defendant's intent to kill his brother was transferred to the sister-in-law, the actual victim. *Walden v. State*, 29 So. 3d 17 (Miss. Ct. App. 2008), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 105 (Miss. 2010).

18. Homicide by persons joining in commission of felony.

Although defendant, who was convicted of murder while engaged in the crime of drive-by shooting and for shooting into an occupied dwelling, argued that the State failed to prove that he willfully discharged a pistol into a dwelling, the evidence amply supported the jury's finding that defendant willfully shot into an occupied dwelling. Two witnesses testified that defendant expressed his intent to shoot at the victim's house and that he admitted shooting the victim, and the victim's girlfriend identified defendant's voice during an altercation that took place outside the victim's home immediately prior to the shooting. *Boyd v. State*, 977 So. 2d 329 (Miss. 2008).

In order to obtain a valid conviction of a defendant for felony murder while engaged in the crime of drive-by shooting, the State is required to prove all essential elements of both Miss. Code Ann. § 97-3-19(1)(c) and Miss. Code Ann. § 97-3-109(1). Thus, the State is required to prove under Miss. Code Ann. § 97-3-109(1) that the defendant caused serious bodily injury to another purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life by discharging a firearm while in or on a vehicle. *Boyd v. State*, 977 So. 2d 329 (Miss. 2008).

Post-conviction relief was properly denied where: (1) trial counsel did not err in failing to seek a change of venue because of pretrial publicity; (2) petitioner's culpability as a capital murder accomplice would not be reduced by testimony of a clinical psychologist who opined that petitioner was not by nature a violent person; (3) although the aggravating circumstances which invoked the death penalty were not charged in the indictment, the fact that the capital murder statute listed the possible aggravating circumstances refuted the contention that petitioner had inadequate notice; (4) because the record supported no findings of error, there could be no prejudicial cumulative error; (5) use of the underlying felony as an aggravating sentencing factor did not constitute impermissible double prejudice; and (6) other issues raised on direct appeal could not be considered on collateral appeal under Miss. Code Ann. § 99-39-21. *Thong Le v. State*, 967 So. 2d 627 (Miss. 2007), writ of certiorari denied by 552 U.S. 1300, 128 S. Ct. 1747, 170 L. Ed. 2d 547, 2008 U.S. LEXIS 2913, 76 U.S.L.W. 3528 (2008).

19. Homicide by commission of dangerous act.

Evidence was sufficient to convict defendant of depraved-heart murder because he fired a gun into a fleeing group of people, which was a classic case of this offense. *Humphries v. State*, 18 So. 3d 305 (Miss. Ct. App. 2009).

20. Killing as manslaughter.

In defendant's trial for murder, defendant's act of shooting the victim in the head at short range did not qualify as heat of passion of manslaughter because while the conversation might have been heated with defendant's mother, the victim was a mere bystander to it; the victim's statement that defendant and defendant's mother needed to quit fighting did not cause a normal mind to be roused to the extent that reason was overthrown and that passion usurped the mind destroying judgment. *Mullen v. State*, 986 So. 2d 320 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 559 (Miss. 2008).

There was sufficient evidence to support a conviction for murder under Miss. Code

Ann. § 97-3-19(1)(a), rather than manslaughter under Miss. Code Ann. § 97-3-35, where the facts showed that defendant had been having domestic problems with his wife, he cashed a check for a large sum of money, and then went to her work where he shot her to death. *Bennett v. State*, 956 So. 2d 964 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 2007 Miss. LEXIS 293 (Miss. May 17, 2007).

21. Indictment.

Court rejected defendant's argument that his death sentence has to be vacated because the indictment failed to include a statutory aggravating factor or the mens rea standard required for capital murder. When defendant was charged with capital murder, he was put on notice that the death penalty might result, what aggravating factors might be used, and the mens rea standard that was required. *Goff v. State*, 14 So. 3d 625 (Miss. 2009), modified by 2009 Miss. LEXIS 406 (Miss. Aug. 27, 2009), writ of certiorari denied by 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251, 78 U.S.L.W. 3480 (U.S. 2010).

24. Conviction of lesser offense.

Evidence was sufficient to convict defendant of manslaughter under Miss. Code Ann. § 97-3-35 as she was the only other person in the house, a deadly weapon was used, there was no evidence of self-defense, and scientific evidence of the gunshot wound showed that the victim could not have inflicted it himself, either by accident or suicide. Further, there was no prejudice to defendant as she was convicted of the lesser-included offense where proof would have supported conviction of the greater offense of deliberate-design murder. *Simpson v. State*, 993 So. 2d 400 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 552 (Miss. 2008), writ of certiorari denied by 555 U.S. 1188, 129 S. Ct. 1348, 173 L. Ed. 2d 614, 2009 U.S. LEXIS 1379, 77 U.S.L.W. 3469 (2009).

25. Trial; generally.

26. —Prosecutorial misconduct.

Defendant's conviction for murder under Miss. Code Ann. § 97-3-19(1)(b) was

proper, in part because defendant failed to prove any prosecutorial misconduct. The prosecutor was permitted to summarize the police investigation and the comment was not a comment on defendant's failure to testify; further, the prosecutor was not vouching for a witness's credibility but instead simply gave a summation of the evidence and inferred that the trial testimony was false. *Franklin v. State*, 72 So. 3d 1129 (Miss. Ct. App. 2011), writ of certiorari denied by 71 So. 3d 1207, 2011 Miss. LEXIS 508 (Miss. 2011).

In a capital murder trial, defendant failed to prove that the prosecutor committed misconduct by identifying the victim as a police officer; the information was not admitted as victim-characteristic evidence at the sentencing phase, but, rather, was an integral part of the proof necessary to establish the capital offense, Miss. Code Ann. § 97-3-19(2)(a). *Maye v. State*, 49 So. 3d 1140 (Miss. Ct. App. 2009), vacated by, remanded by 49 So. 3d 1124, 2010 Miss. LEXIS 622 (Miss. 2010).

28. —Ineffective assistance of counsel.

In a capital murder trial, a defendant's claim of ineffective assistance of trial counsel based on false arrest, failure to interview alibi witnesses, failure to view alleged evidence, and failure to object to the prosecutor's closing argument could be raised on direct appeal because the facts were fully apparent from the record. *Scott v. State*, 8 So. 3d 855 (Miss. 2008), writ of certiorari denied by 130 S. Ct. 1500, 176 L. Ed. 2d 117, 2010 U.S. LEXIS 1205, 78 U.S.L.W. 3480 (U.S. 2010).

Denial of the appellant inmate's request for post-conviction relief after he was convicted of capital murder (murder during the commission of sexual battery) was appropriate because he failed to prove that he received the ineffective assistance of counsel. Even if counsel had procured a DNA expert who testified that the inmate's DNA was not present, that did not exonerate the inmate of the sexual battery charge because sexual penetration could be by insertion of any object into the genital or anal opening of another person's body. *Havard v. State*, 988 So. 2d 322 (Miss. 2008).

Defendant's claim of ineffective counsel in a murder trial failed because the jury instructions were proper and requesting a jury instruction on manslaughter that was commonly given on the prosecution's request was permissible trial strategy to try to ensure that the jury knew they were not required to find murder, and that a lesser offense was available when there was strong evidence that defendant shot the victim. *Mullen v. State*, 986 So. 2d 320 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 559 (Miss. 2008).

29. —Continuance.

At the beginning of defendant's trial for murder in violation of Miss. Code Ann. § 97-3-19, the court did not abuse its discretion in denying defendant's motion for a continuance so that he could obtain the results of the toxicology screen on the victim's blood. The fact that the victim was using cocaine did not indicate that he was the aggressor. *Flags v. State*, 999 So. 2d 393 (Miss. Ct. App. 2008), writ of certiorari dismissed, dismissed without prejudice by, writ of certiorari denied by 2009 Miss. LEXIS 37 (Miss. Jan. 22, 2009), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 53 (Miss. 2009).

30. Prejudicial or harmless error; generally.

32. —Instructions.

Regarding defendant's claim that a trial court erred during his capital murder trial in denying his attempt to argue self-defense in his closing argument in light of the capital murder jury instruction, although the portion of the capital murder jury instruction reading, "not in necessary self-defense," was inappropriate, it was harmless error because it was clear beyond a reasonable doubt that it did not contribute to the verdict. Defendant was properly precluded from arguing self-defense at trial, as he was charged under the capital murder statute. *Beale v. State*, 2 So. 3d 693 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 90 (Miss. 2009).

In a case in which defendant was convicted of murder, the trial court properly refused defendant's requested jury in-

structions on manslaughter, as there was insufficient evidence in the record to support the elements of manslaughter. There was no evidence in the record from which the jury could have determined the killing occurred during heat of passion. *Alford v. State*, 5 So. 3d 1138 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 185 (Miss. 2009).

II. EVIDENTIARY MATTERS.

33.5 — Death certificate.

Defendant's capital murder conviction was appropriate because his right to confrontation was not violated by the admission of the victim's death certificate into evidence. The death certificate was admissible as a public record under Miss. R. Evid. 902(4) and, while the trial court erred in allowing the death certificate into evidence showing the purported time of injury under Miss. R. Evid. 803(9), the error was harmless because witnesses testified that they could not be positive of the time of injury or the time of death. *Birkhead v. State*, — So. 3d —, 2009 Miss. LEXIS 73 (Miss. Feb. 19, 2009), opinion withdrawn by, substituted opinion at 57 So. 3d 1223, 2011 Miss. LEXIS 99 (Miss. 2011).

34. Evidence; generally.

Because the Weathersby doctrine should have been applied, based on the fact that the accounts of defendant and a witness of the events leading up to the stabbing and its aftermath were reasonable and not substantially contradicted, a circuit court was required to accept the accounts as true and should have acquitted defendant. *Johnson v. State*, 987 So. 2d 420 (Miss. 2008).

Where defendant admitted to stabbing the victim, any error in the admission of expert testimony concerning blood spatter evidence did not warrant the reversal of defendant's conviction for murder under Miss. Code Ann. § 97-3-19(1); there was sufficient evidence to show that defendant did not act in self-defense. *Flags v. State*, 999 So. 2d 393 (Miss. Ct. App. 2008), writ of certiorari dismissed, dismissed without prejudice by, writ of certiorari denied by 2009 Miss. LEXIS 37 (Miss. Jan. 22, 2009), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 53 (Miss. 2009).

Defendant's convictions for murder and aggravated assault, under Miss. Code Ann. §§ 97-3-19(1), 97-3-7(2), were not against the weight of the evidence because allowing the verdict to stand would not have sanctioned an unconscionable injustice because there was nothing that would have led an appellate court to disagree with a jury's assessment of the conflicting testimony with which it was presented. *Readus v. State*, 997 So. 2d 941 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 27 (Miss. 2009).

35. Witnesses—defendant as only witness to offense.

Murder defendant was not entitled to protection of the *Weathersby* rule—under which his version of the killing, if reasonable, would be accepted as true—because his account of the killing was contradicted by a subsequent account of his, and forensic evidence concerning the trajectory of the bullet at least partially contradicted his account. *Williams v. State*, 973 So. 2d 1012 (Miss. Ct. App. 2008).

37. Admissibility; generally.

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), he argued unsuccessfully that when the prosecutor asked the victim's grandfather what he believed defendant's punishment should be, that action violated his rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and under Article 3, Sections 14, 25, and 28 of the Mississippi Constitution. It was highly unlikely that the grandfather's statement, when read as a whole and taken in context with all the evidence before the sentencing judge, was the reason the judge imposed the death penalty; in fact, the trial judge's sentencing order, in which he made findings of facts as to the various aggravating and mitigating factors, did not even mention the grandfather's testimony. *Wilson v. State*, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (U.S. 2010).

In a case in which defendant appealed his sentence of death by lethal injection

for violating Miss. Code Ann. § 97-3-19(2)(f), he argued unsuccessfully that the prosecution committed misconduct by improperly cross-examining a mitigation witness, thereby depriving him of a fundamentally fair sentencing. The witness, a former teacher, was questioned about defendant's drinking habits and illegal drug use, and, while defendant argued that there was no evidentiary basis for that line of questioning, the questioning was based a mental health evaluation that was properly before the court; since the questioning of the witness was to test her knowledge of defendant's habits, there was no battle of opinions between the doctor who prepared the report and the witness such that the doctor had to be called as a witness to avoid a violation of the Confrontation Clause. *Wilson v. State*, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (U.S. 2010).

In the sentencing portion of petitioner inmate's bifurcated trial for capital murder, pursuant to Miss. Code Ann. § 99-19-101(1), the inmate did not have the right to present evidence—specifically evidence that he did not commit rape—that was inconsistent with the verdict of the guilt-phase jury. Under Miss. Code Ann. § 97-3-19(2)(e), of which the inmate was convicted, the commission of the crime of rape was an element of capital murder. *Holland v. Anderson*, 583 F.3d 267 (5th Cir. 2009), writ of certiorari denied by 130 S. Ct. 2100, 176 L. Ed. 2d 731, 2010 U.S. LEXIS 3429, 78 U.S.L.W. 3610 (U.S. 2010).

In a case in which defendant was convicted on two counts of capital murder, in violation of Miss. Code Ann. § 97-3-19(2)(e), the trial court did not err when it excluded evidence that he attempted to commit suicide after he shot the two murder victims because evidence of his attempted suicide was not relevant. Defendant argued that his attempted suicide relevant to his state of mind and bolstered his argument that he acted in the heat of passion; while his attempted suicide could arguably be viewed as evidence that he regretted his actions, under the circumstances, it did not tend to make it more probable that he acted in the heat of

passion when he killed the two victims. *Williams v. State*, 29 So. 3d 53 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 116 (Miss. 2010).

In defendant's trial for capital murder of defendant's five-year-old child, a recording of defendant's phone call made from the jail in which defendant admitted to killing the child was admissible because the recording was sufficiently authenticated under Miss. R. Evid. 901 when a detective testified that he recognized defendant's voice and defendant identified herself during the phone call. Even if there were any error on the trial court's part in admitting the tape, that error would be harmless because it was debatable whether the audio recording in question contained any more incriminating information than what defendant gave in her statement to police and on the stand at trial. *Broadhead v. State*, 981 So. 2d 320 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 210 (Miss. 2008).

39. —Admissions; confessions.

Defendant's confession was admitted in a murder case under Miss. Code Ann. § 97-3-19(1)(a) because there were no threats, promises, or inducements, despite the fact that defendant was a long-time acquaintance of the deputy taking the statement. Because defendant was a bail bondsman, he understood criminal procedure, knew of his right to remain silent, and knew to ask for an attorney. *Green v. State*, 982 So. 2d 471 (Miss. Ct. App. 2008).

41. —Photographs, other prejudicial evidence.

42. — —Photographs as admissible.

Defendant's convictions for capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e), aggravated assault in violation of Miss. Code Ann. § 97-3-7(2), and conspiracy to commit aggravated assault were appropriate because the victim's autopsy photographs were admissible since their probative value was not outweighed by any danger of undue prejudice and since there was a meaningful evidentiary purpose. *Williams v. State*, 3 So. 3d 105 (Miss. 2009).

In defendant's trial for capital murder of defendant's five-year-old child, autopsy photographs were properly admitted because the photographs were of significant probative value when the photographs showed the severity of the beatings, which defendant denied, and corroborated the testimony of defendant's daughter and the findings of the coroner. The photographs' probative value clearly outweighed their prejudicial effect, and the trial court did not err in admitting them. *Broadhead v. State*, 981 So. 2d 320 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 210 (Miss. 2008).

In a case where defendant was charged with capital murder after he slammed his car into a patrol car that was blocking his path during a chase, a trial court did not err by allowing the introduction of pictures of the deceased officer since they were relevant and clarified the circumstances and manner of death for the jury. *White v. State*, 964 So. 2d 1181 (Miss. Ct. App. 2007).

In a capital murder case, autopsy photographs of a victim who was shot multiple times in the head, neck, and shoulder were admissible because their probative value outweighed the prejudice; they were used to corroborate the testimony of an officer who found the body and to support the theory that the victim had been thrown from a vehicle after the shooting. *Ramsey v. State*, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

In a murder case, photographs of the victim lying in a doorway and closeups of the victim's head were properly admitted under Miss. R. Evid. 403; they were not cumulative, nor did the potential for prejudice outweigh the probative value where the pictures were at different angles, and it was not possible to get all the information in a single picture. *Jones v. State*, 938 So. 2d 312 (Miss. Ct. App. 2006).

Admission of photographs of the victim in a murder case was not an abuse of discretion because the photographs were not overly gruesome; they had evidentiary value, as they depicted the circumstances of the shooting, the location of the body,

and the cause of death; and they supplemented and clarified testimony regarding the location of the wounds, the trajectory of the bullets, the number of the bullets, and the cause and manner of death. *Cotton v. State*, 933 So. 2d 1048 (Miss. Ct. App. 2006).

43. —Expert testimony; scientific techniques.

Expert testimony as to the cause and manner of the victim's death was permissible in defendant's murder trial because the trial court accepted, without objection from defendant, that the expert was qualified in the area of forensic pathology, and the expert did not testify that he was the State Medical Examiner, and, therefore, the expert was not required to be board certified by the American Board of Pathology. *Keys v. State*, 33 So. 3d 1143 (Miss. Ct. App. 2009), writ of certiorari denied by 34 So. 3d 1176, 2010 Miss. LEXIS 228 (Miss. 2010).

Expert testimony as to the type of bullet that killed a victim was permissible in defendant's murder trial because the trial court accepted that the expert was qualified in the area of forensic pathology, terminal ballistics was a subfield of forensic pathology, and defendant was procedurally barred from challenging the expert's qualifications because he failed to object to them at trial. *Keys v. State*, 33 So. 3d 1143 (Miss. Ct. App. 2009), writ of certiorari denied by 34 So. 3d 1176, 2010 Miss. LEXIS 228 (Miss. 2010).

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), citing the Mississippi Supreme Court's reversal in the Edmonds decision, he argued unsuccessfully that the admission of testimony by an expert witness was improper and the result of ineffective assistance of counsel. The witness was an expert in forensic pathology, and the reversal in the Edmonds decision was not based on the witness's lack of expertise; it was based on the witness offering an off-the-cuff opinion. *Wilson v. State*, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (U.S. 2010).

In a case where defendant was charged with capital murder after he slammed his car into a patrol car that was blocking his path during a chase, a trial court did not err by allowing a forensic pathologist to testify about an officer's location when he was killed because, under Miss. R. Evid. 702, the pathologist was allowed to testify as an expert that the wounds indicated that the officer was not inside the vehicle. *White v. State*, 964 So. 2d 1181 (Miss. Ct. App. 2007).

48. Insanity.

Under Miss. Code Ann. § 99-13-7, if the jury had acquitted defendant on both counts and had found him not to have been restored to reason, but had not found that he was a danger to the community, commitment under that statute would not have been mandatory. Despite the unusual circumstances of the sentencing order, the trial court properly exercised its discretion in requiring defendant to first to serve his mandatory life sentence before his term of an indefinite confinement in a mental institution. *Sanders v. State*, 63 So. 3d 497 (Miss. 2011).

Defendant's conviction on Count II for murder was proper because, when analyzing the weight of the evidence that supported the jury's verdict, the appellate court was prohibited from considering what the jury did on the Count I murder indictment where defendant was found not guilty of by reason of insanity; it was irrelevant and immaterial. *Sanders v. State*, 63 So. 3d 554 (Miss. Ct. App. 2010), affirmed by 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

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In a murder case under Miss. Code Ann. § 97-3-19(1)(a), a trial court properly refused to instruct a jury on insanity where the evidence showed that defendant did

not have a medical condition that contributed to the crime, and a psychiatrist testified that he was aware of the nature and act of murder due to his conduct before and after the crime. *Clemons v. State*, 952 So. 2d 314 (Miss. Ct. App. 2007).

49. Sufficiency of evidence; generally.

Evidence established the elements of murder beyond a reasonable doubt; appellant armed himself with a baseball bat with the intent to cause serious bodily injury or death to the victim and struck an unarmed victim in the head three times with the baseball bat, the first of which would have knocked him unconscious and defenseless. These actions resulted in the victim's death; the victim was not in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered the business when appellant began attacking the victim. *Westbrook v. State*, 29 So. 3d 828 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 29 So. 3d 774, 2010 Miss. LEXIS 124 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 98, 178 L. Ed. 2d 62, 2010 U.S. LEXIS 5934, 79 U.S.L.W. 3197 (U.S. 2010).

Evidence was sufficient to support defendant's capital murder conviction where, although none of the information surrounding the crime had been released to the public and although defendant alleged that another person had committed the crime, defendant provided an accurate description of how the assault occurred, a description of the victim's clothing, and the location of the victim's wallet. Further, defendant's cellmate testified that, during their incarceration, defendant confessed to the robbery and assault and indicated that defendant said she left the victim naked to make it appear as if a man had committed the crime. *Dixon v. State*, 17 So. 3d 1099 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 451 (Miss. 2009).

Two defendants' convictions for depraved-heart murder in violation of Miss. Code Ann. § 97-3-19(1)(b) were appropriate because all eyewitnesses testified that the first defendant, who was the second defendant's son, repeatedly struck the victim; there was also sufficient evidence that the second defendant aided and abetted the first defendant in the victim's

murder. *McDowell v. State*, 984 So. 2d 1003 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 328 (Miss. 2008).

Evidence was sufficient to convict defendant of murder where it showed the reckless and brutal nature of the crime; defendant admitted to beating and stomping the victim, numerous bruise patterns on the victim's back matched a pattern on the bottom of defendant's shoes, and there was testimony that defendant did not fight back. *Conley v. State*, 948 So. 2d 462 (Miss. Ct. App. 2007).

In a murder case, a motion for a new trial was properly denied because the verdict was not so contrary to the overwhelming weight of the evidence as to constitute an unconscionable injustice; there was conflicting testimony that defendant intended to hurt his grandfather, and he admitted to killing his grandfather, though he, the only witness to the actual crime, claimed self-defense. *Jones v. State*, 938 So. 2d 312 (Miss. Ct. App. 2006).

Defendant's murder conviction was not against the overwhelming weight of the evidence where three witnesses testified that they saw defendant murder his estranged wife's boyfriend, and a fourth witnessed the circumstances surrounding the murder, *Livingston v. State*, 943 So. 2d 66 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 708 (Miss. 2006).

In a capital murder case, the evidence was sufficient to sustain the underlying armed robbery because a witness testified that two males wearing ski masks and gloves and brandishing pistols entered the store, pointed their guns at the witness and the victim, ordered them to hand over the money, and the victim was shot and killed during the robbery. *Duncan v. State*, 939 So. 2d 772 (Miss. 2006).

50. — Conviction sustained — murder.

Jury's verdict that found defendant guilty of murder pursuant to Miss. Code Ann. § 97-3-19(1) (Rev. 2006), rather than manslaughter, was supported by the evidence. From evidence that several minutes had passed between the initial disagreement between defendant and the victim before defendant attacked the vic-

tim with a steak knife, the jury could find that defendant acted with deliberate design or in a way that was eminently dangerous to others and evidenced a depraved heart when she stabbed the victim in the neck. *McKay v. State*, 59 So. 3d 644 (Miss. Ct. App. 2011).

Evidence was sufficient to convict defendant of depraved-heart murder under Miss. Code Ann. § 97-3-19 (Rev. 2006) as the evidence showed that, after defendant's cohort threw a tire iron at the victim, causing the victim to fall to the ground, defendant retrieved the tire iron and proceeded to repeatedly strike the victim in the head with it. *Leggett v. State*, 54 So. 3d 317 (Miss. Ct. App. 2011).

Evidence was sufficient to convict a second defendant of manslaughter, murder, and aggravated assault as the evidence showed that defendant shot his firearm multiple times at the victims and that he did so with deliberate design. The surviving victim testified that this defendant had a gun and fired it, and an intent to kill could be inferred from use of a gun. *Sands v. State*, 62 So. 3d 374 (Miss. 2011).

Defendant's conviction for murder, in violation of Miss. Code Ann. § 97-3-19(1), was supported by the evidence because defendant admitted to the jury that the victim, a fellow gang member, was unarmed when defendant shot the victim; several people were present in the room, and others, including an infant, were present in the house at the time of the shooting. Defendant left the scene without ensuring that the victim received medical assistance. *Pitts v. State*, 66 So. 3d 174 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 65 So. 3d 310, 2011 Miss. LEXIS 354 (Miss. 2011).

Evidence showing that defendant fought with the victim, held the victim down, and accidentally shot himself in the hand, and then shot the victim a total of six times was sufficient to show deliberate design, in addition to evidence of manslaughter, thus leaving a question of fact for the jury and supporting the trial judge's denial of defendant's motion for a directed verdict. *Roach v. State*, 39 So. 3d 967 (Miss. Ct. App. 2010).

Evidence was sufficient to sustain a conviction for murder, pursuant to Miss.

Code Ann. § 97-3-19(1)(a), because a rational trier of fact could have found that the prosecution proved that defendant was guilty of murder beyond a reasonable doubt where defendant reentered a club after leaving, walked up to the victim, and stabbed him. The jury acted within its discretion when it discounted defendant's various versions of the events. *Porter v. State*, 33 So. 3d 535 (Miss. Ct. App. 2010).

Weight of the evidence at trial supported defendant's conviction for felony murder, pursuant to Miss. Code Ann. § 97-3-19(1)(c), because the admissions in defendant's statement to the police showed that he actively participated in an attempted aggravated assault against an intended victim; he armed himself with a .25-caliber handgun and his companion expressed a desire to shoot the intended victim. *Coleman v. State*, 30 So. 3d 387 (Miss. Ct. App. 2010).

Defendant's conviction on Count II for the murder of his grandmother was proper because there was no eyewitness testimony that verified that defendant was suffering from delusions in the days preceding the shootings or at the time of the shootings, and the State offered competent medical evidence to show that he was not insane at the time of the shootings of his grandparents. *Sanders v. State*, 63 So. 3d 554 (Miss. Ct. App. 2010), affirmed by 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

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Defendant's murder convictions in violation of Miss. Code Ann. § 97-3-19(1)(a) were proper because he had threatened to kill one victim, his former girlfriend. Additionally, defendant's cell phone connected with a tower only three or miles from the crime scene at the time of the

murders, and evidence was presented that defendant owned a weapon like the one used in the murders, contrary to his assertions. *Madden v. State*, 42 So. 3d 566 (Miss. Ct. App. 2010), writ of certiorari dismissed by 49 So. 3d 106, 2010 Miss. LEXIS 460 (Miss. 2010).

Where the evidence showed that defendant had conducted his own investigation to find out who was having sexual relations with his wife, after identifying the victim as the one having the affair, proceeded to the victim's house armed with a gun, phoned his attorney and informed him of his intention to kill someone, and shot the unarmed victim, there was abundant evidence that the killing at issue was done with deliberate design so as to support a murder conviction, and the circuit court did not err in refusing defendant's manslaughter instruction. *Shorter v. State*, 33 So. 3d 512 (Miss. Ct. App. 2009).

Defendant's conviction for murder in violation of Miss. Code Ann. § 97-3-19(1)(a) was proper because there was no evidence that warranted an assisted-suicide instruction. Defendant did not claim to have advised, encouraged, abetted, or assisted the victim to take or in the taking of her life; at most, defendant's statement revealed that the two talked about committing suicide together. *Williams v. State*, 53 So. 3d 761 (Miss. Ct. App. 2009), reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

Defendant's conviction for capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e) was proper because the evidence was sufficient to support the conviction. In part, two witnesses saw defendant standing beside the victim's car immediately after they heard shots being fired and defendant himself testified that he used the victim's credit card to go on a shopping spree on the day the victim died. *Catchings v. State*, 39 So. 3d 943 (Miss. Ct. App. 2009), writ denied by 39 So. 3d 5, 2010 Miss. LEXIS 382 (Miss. 2010), writ of certiorari denied by 132 S. Ct. 1546, 182 L. Ed. 2d 178, 2012 U.S. LEXIS 1556, 80 U.S.L.W. 3476 (U.S. 2012).

Evidence was sufficient to convict defendant because the victim was killed by a gun fired while in contact with her head, there was no evidence that the victim held

the gun, and defendant and the victim had checked into the motel room where the victim was found. *Brown v. State*, 39 So. 3d 916 (Miss. Ct. App. 2009), reversed by, remanded by 39 So. 3d 890, 2010 Miss. LEXIS 370 (Miss. 2010).

Evidence was sufficient to convict defendant of murder under Miss. Code Ann. § 97-3-19(1)(a) (2006) because there was contradictory evidence from which a reasonable juror could have rejected defendant's claim of self-defense, and which established that defendant intended to cause his victim's death, including testimony from a neighbor, who heard an altercation, and testimony from a friend, who averred that defendant stated he intended to kill his girlfriend due to her infidelity. *Reed v. State*, 31 So. 3d 48 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 151 (Miss. 2010).

Evidence was sufficient to support defendant's conviction of murder because a pathologist testified that the victim's death resulted from a violent struggle, that something had been tied around the victim's neck so that she could not breathe, and that she was immersed in water so that, when she was able to gasp, her lungs filled with water, resulting in her death. The *Weathersy* rule—under which a jury was required to accept the version of events of defendant or defendant's witnesses if they were the only witnesses to the homicide—did not apply because defendant did not establish his version of the victim's death—which he claim resulted from acts committed in self-defense—because defendant did not establish his version of the victim's death through his own testimony or that of other witnesses. *Bartolo v. State*, 32 So. 3d 522 (Miss. Ct. App. 2009).

Verdict of murder under Miss. Code Ann. § 97-3-19 was not against the overwhelming weight of the evidence as the testimony presented a factual dispute for the jury's resolution and the jury found certain testimony to be credible and defendant's attempts to establish a self-defense theory to be contradictory; although defendant cited to Miss. Code Ann. § 97-3-31, which provided for a manslaughter conviction when one killed another while

resisting a felony, there was conflicting testimony as to whether the victim was attempting to commit a felony, and although defendant also cited to Miss. Code Ann. § 97-3-35 and claimed the evidence supported a heat of passion manslaughter conviction, there was no evidence that defendant was acting in a state of violent and uncontrollable rage and he only attempted to show that he was afraid of the victim and acted in self-defense. *Ray v. State*, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Court rejected as without merit defendant's claim that the trial court erred in failing to grant his motion for a judgment notwithstanding the verdict, given that the jury was instructed to consider whether the victim's killing was murder, manslaughter, or committed in self-defense and the jury had sufficient evidence to convict defendant of murder; although defendant argued that the facts supported either excusable or justifiable homicide, the facts were conflicting and created a jury question, as testimony and physical evidence contradicted defendant's testimony that the victim backed him up steps and defendant having left the scene immediately after the stabbing created the impression that he knew the victim was no longer a threat. *Ray v. State*, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Defendant's conviction for murder in violation of Miss. Code Ann. § 97-3-19(1) was appropriate because his actions were the epitome of an act eminently dangerous to others and evincing a depraved heart, without regard for human life. Defendant had exited a nightclub after being in a fight and pulled a gun and fired 10 to 12 shots into a crowded parking lot, hitting four people. *Jackson v. State*, 28 So. 3d 638 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 85 (Miss. 2010).

Evidence, including testimony of a witness regarding how defendant was driving in relation to the victim's car, the testimony of another witness who spoke on the phone with the victim and testified that the victim seemed scared and was scream-

ing, and the testimony of an expert witness who reconstructed the accident scene, was sufficient for a rational juror to convict defendant of depraved-heart murder in violation of Miss. Code Ann. § 97-3-19. *Nichols v. State*, 27 So. 3d 433 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 70 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 97, 178 L. Ed. 2d 61, 2010 U.S. LEXIS 5836, 79 U.S.L.W. 3197 (U.S. 2010).

Witness testimony that defendant chased the victim into an empty lot while firing a gun at him and that the victim's body was found in that lot and gunshot residue testing that revealed gunpowder on defendant's hand were sufficient to support defendant's conviction of murder under Miss. Code Ann. § 97-3-19(1)(a). *Watkins v. State*, 29 So. 3d 807 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 126 (Miss. 2010).

Evidence supported the verdict of guilt where, in his confessions to the murder, defendant gave detailed explanations of what occurred and of his motive; defendant's confessions, along with the testimony of investigating officers, strongly preponderated in favor of the finding of guilt. *Neal v. State*, 15 So. 3d 388 (Miss. 2009).

Where defendant confessed to police that he choked the victim while at his house watching TV and smoking marijuana, he also admitted that he found a plastic garbage bag and duct tape; his cohort placed the bag around the victim's face and defendant taped the bag around the victim's head. A doctor testified that the victim's death was caused by strangulation and suffocation; the Supreme Court of Mississippi held that the evidence was sufficient to support defendant's conviction for murder in violation of Miss. Code Ann. § 97-3-19, and his prosecution for both capital murder and kidnapping did not violate double jeopardy. *Nelson v. State*, 10 So. 3d 898 (Miss. 2009).

Trial court did not err in denying defendant's motion for a JNOV because the evidence was sufficient to support the jury verdict finding defendant guilty of murder under Miss. Code Ann. § 97-3-19(1)(a) where the evidence showed that the half-

sister of defendant's ex-wife showed defendant where the ex-wife's boyfriend—the victim—lived, that defendant told his ex-wife's sister not to tell anyone that she showed him where the victim lived, that defendant was furious when he saw that his ex-wife as at the victim's house, that the ex-wife noticed a van similar to that driven by defendant drive by the victim's house, that defendant dropped his ex-wife's half-sister off at home at 1:00 a.m., that the victim was last week alive at 2:00 a.m., that the half-sister tried to call defendant at 3:00 a.m. but he was not at home, that the victim's neighbor noticed a van similar to that belonging to defendant parked in the victim's driveway in the early morning hours, and that defendant threatened his wife that he would kill her and any man with whom he caught her. *Parker v. State*, 20 So. 3d 702 (Miss. Ct. App. 2009), writ of certiorari denied by 20 So. 3d 680, 2009 Miss. LEXIS 544 (Miss. 2009).

Where defendant disarmed his victim and fired the gun in the victim's direction and into a crowded nightclub, killing the victim and another and wounding three others, the trial court did not err in denying defendant's motion for a judgment notwithstanding the verdict because the evidence was sufficient to support defendant's convictions of murder, aggravated assault, and felon in possession of a firearm. *Roberson v. State*, 19 So. 3d 95 (Miss. Ct. App. 2009).

Evidence was sufficient to support defendant's convictions of murder and armed robbery where defendant's companions testified that they accompanied defendant to the victim's home seeking employment; that the victim told them that they could spend the night rather than driving all the way home; that defendant told them that he was going to rob the victim; that defendant headed toward the victim's bedroom after the victim retired; that as his companions left the home, they heard gunshots coming from the bedroom and that one looked back and saw defendant taking the victim's wallet out of his pocket; and that defendant jumped into their vehicle as they were departing and he had blood on him and was carrying a gun. Further evidence was

justified defendant's conviction was testimony that defendant was angry with the victim for docking his pay after finding him sleeping on the job and the testimony of defendant's brother that defendant admitted commission of the offenses. *Lewis v. State*, 997 So. 2d 1001 (Miss. Ct. App. 2009).

Defendant's conviction for murdering his girlfriend was appropriate because defendant's friend, who was the only eyewitness to the incident, testified that defendant deliberately shot the victim in the head at point-blank range. Deliberate design to kill a person could be formed very quickly and the friend further recounted no "heat of passion" element to forward a possible manslaughter conviction; defendant also did not produce any evidence to that effect. *Fannings v. State*, 997 So. 2d 953 (Miss. Ct. App. 2008).

Defendant's murder conviction was appropriate because the admission of his statement given without a proper Miranda warning was harmless since, even without the videotaped statement, based on the overwhelming weight of the evidence of defendant's guilt, a jury would have found beyond a reasonable doubt that defendant was guilty. In part, three of the four codefendants present on the day of the murder testified that defendant was the shooter and two of those codefendants were eyewitnesses to the murder. *Walton v. State*, 998 So. 2d 971 (Miss. 2008).

Evidence was sufficient to support defendant's conviction of depraved heart murder because several witnesses testified that the shooter left the scene in defendant's vehicle, another witness obtained a partial plate number that matched that of defendant's vehicle, two witnesses positively identified defendant as the shooter in a photographic lineup shortly after the shooting, and six witnesses identified defendant as the shooter in court during his trial. *Jordan v. State*, 995 So. 2d 94 (Miss. 2008).

Defendant was not entitled to a new trial because the verdict finding defendant guilty of murder was not against the overwhelming weight of the evidence since (1) the victim's son, who witnessed the shooting, made consistent statements in court and to other individuals after the

shooting about what defendant did and said right before he shot the victim; and (2) the attempted impeachment of the son involved insignificant details that happened prior to the shooting. *Mask v. State*, 996 So. 2d 106 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 631 (Miss. 2008).

Evidence was sufficient to deny defendant's motion for a directed verdict and to convict him of murder because (1) the victim's son, who was in the car with the victim, testified that defendant approached his father, pointed a gun at his father, and shot his father; (2) even if the murder was an accident, as defendant claimed, a reasonable juror could still find defendant guilty of depraved-heart murder under Miss. Code Ann. § 97-3-19(1)(b); and (3) a reasonable juror could reject defendant's argument that he shot the victim in self-defense because the victim was shot in the back. *Mask v. State*, 996 So. 2d 106 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 631 (Miss. 2008).

Evidence was sufficient to support a jury's finding that a defendant murdered his ex-wife because the evidence showed that: (1) approximately two weeks before the ex-wife's death, the defendant told a witness that if the ex-wife tried to move to Colorado with their children, he would kill her; (2) she was in fact planning to move to Colorado about the time of her death; (3) on the date of the murder, the defendant told a friend that he had "beat her [the ex-wife] real bad this time"; and (4) a couple of weeks later, the defendant asked the friend to dispose of a tent stake that might be confused for the murder weapon. *Davis v. State*, 995 So. 2d 808 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 163 (Miss. 2009).

Evidence was sufficient to support a conviction of both murder and aggravated assault, under Miss. Code Ann. §§ 97-3-19(1), 97-3-7(2), because a rational juror could have concluded beyond a reasonable doubt that defendant was guilty of both murder and aggravated assault because (1) the evidence tended to show that defendant acted recklessly in the commission of an imminently dangerous act and

with extreme indifference to human life; (2) the State produced evidence showing that defendant fired a gun inside of an apartment that contained two unarmed individuals, as well as several children; (3) the State also established that defendant's firing of the gun resulted in the death of his wife and serious bodily injury to his stepson; and (4) defendant admitted pulling out the gun and firing it inside the apartment. *Readus v. State*, 997 So. 2d 941 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 27 (Miss. 2009).

Sufficient evidence supported the jury's finding that defendant shot the victim and caused the victim's death. Although defendant argued that the State failed to establish that he had possession of the same caliber weapon that delivered the fatal shot, the absence of any evidence to establish that defendant possessed the particular caliber weapon used to shoot the victim was irrelevant. *Boyd v. State*, 977 So. 2d 329 (Miss. 2008).

In a challenge to the weight of the evidence, regarding defendant's motion for a new trial, her argument centered around her contention that there was no evidence that she caused the fire, thereby causing the death of the victim; also, she maintained that the evidence showed she was not at home before the fire was noticed and reported. Because of the many inconsistencies in the various statements of what happened the night of the fire, not to mention defendant's confessions, allowing the verdict finding her guilty of simple murder under Miss. Code Ann. § 97-3-19(1)(a) to stand did not sanction an unconscionable injustice; therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Colburn v. State*, 990 So. 2d 206 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 994 So. 2d 186, 2008 Miss. LEXIS 472 (Miss. 2008).

Trial court did not err in denying defendant's motions for a directed verdict or a judgment notwithstanding the verdict because there was evidence of (1) three confessions made by defendant in the presence of three different individuals; (2) a strained relationship between defendant and the victim; (3) defendant's dislike for

her job as a live-in-caretaker and the victim; and (4) the victim's autopsy showed he did not die of natural causes because he was alive when the fire started. Thus, there was sufficient proof presented at trial to establish the essential elements of murder under Miss. Code Ann. § 97-3-19(1)(a). *Colburn v. State*, 990 So. 2d 206 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 994 So. 2d 186, 2008 Miss. LEXIS 472 (Miss. 2008).

Evidence was sufficient to convict defendant of murder under Miss. Code Ann. § 97-3-19(1) because (1) defendant admitted he was the only adult at home with the victim that day; (2) the evidence of the bloody T-shirt, the bloody piece of the crutch and stopper, and the numerous circular injuries on the victim's body from another piece of the crutch strongly suggested that defendant beat the victim severely with a crutch; (3) the evidence showed that the crutch broke into pieces, and that defendant disposed of the pieces, but that he overlooked the two pieces found by the police; (4) defendant's actions of beating and strangling the victim were willful acts likely to cause death or serious bodily injury and evinced a reckless indifference to the danger to human life from which malice could be inferred; and (5) defendant's expressions of unfamiliarity with the basics of cardiopulmonary resuscitation (CPR) while possessing certification in CPR and first aid training were inconsistent with his innocence of murder. *Staten v. State*, 989 So. 2d 938 (Miss. Ct. App. 2008), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 400 (Miss. 2008).

Directed verdict was denied a murder case under Miss. Code Ann. § 97-3-19(1)(a) because the evidence was sufficient where defendant, a bail bondsman, was owed money by the victim, defendant talked about killing the victim, the victim was picked up by defendant shortly before the shooting, defendant drove by the murder scene, and defendant confessed. Since the evidence was sufficient, a motion for judgment notwithstanding the verdict was properly denied. *Green v. State*, 982 So. 2d 471 (Miss. Ct. App. 2008).

Where defendant was charged with murdering her ex-boyfriend, the jury was

properly instructed regarding manslaughter by culpable negligence under Miss. Code Ann. § 97-3-4. Based on defendant's written confession that she went to the victim's house to discuss their relationship, brought a pistol with her, had an argument with the victim, the gun accidentally discharged, and she attempted to set fire to his truck, the evidence was legally sufficient to support the jury verdict convicting defendant of murder and not manslaughter. *Brown v. State*, 981 So. 2d 1007 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 222 (Miss. 2008).

Evidence was sufficient to support a conviction based on depraved heart murder under Miss. Code Ann. § 97-3-19(1)(b) since defendant fired at an occupied vehicle after arguing with her boyfriend. In reviewing the weight of the evidence, even though there was inconsistent testimony, allowing the verdict to stand would not have sanctioned an unconscionable injustice. *Cooper v. State*, 977 So. 2d 1220 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 1144, 2008 Miss. LEXIS 141 (Miss. 2008).

Evidence was sufficient to support defendant's murder conviction because: (1) the victim was shot four times in the back and once in the chest; (2) three eyewitnesses stated that they saw defendant standing over the victim, shooting him repeatedly; (3) the state pathologist's testimony corroborated that the cause of death was multiple gun shots, consistent with shots being fired from above while the victim was on the ground; (4) both parties stipulated that two of the bullets that were found in the victim's body during the autopsy came from an automatic pistol that defendant admitted at trial was the one he used to shoot the victim; (5) an officer with the sheriff's department testified that approximately one hour after the shooting, defendant turned himself in to the police; and (6) defendant then gave a statement in which he said that during the course of an argument, he shot the victim, but made no claim of seeing the victim with any weapon. *Scott v. State*, 965 So. 2d 758 (Miss. Ct. App. 2007).

Evidence did not so heavily preponderate against the verdict finding defendant

guilty of murder that a new trial was warranted because: (1) defendant admitted to shooting the victim and stated that he did not see the victim with a weapon; (2) three eyewitnesses testified that they saw defendant standing over the victim's body, shooting him repeatedly; (3) no one saw the victim with a weapon and no weapon was seen or found in his car; and (4) the state pathologist confirmed that the victim's wounds were consistent with the victim lying on the ground and being shot from above. *Scott v. State*, 965 So. 2d 758 (Miss. Ct. App. 2007).

Sufficient evidence support defendant's conviction for murder when a rational juror could have concluded that when defendant left the house, he went to get a weapon and then intended to go through with what he had been desiring to do for a long time, to get the victim; he succeeded by firing a shot at close range, several inches away according to expert testimony. *Mullen v. State*, 986 So. 2d 320 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 559 (Miss. 2008).

Defendant's murder conviction was affirmed because the jury heard the testimony from all of the state's witnesses, including the defense's cross-examination of those witnesses, and from the defense's witnesses, including the state's cross-examination of the witnesses; the court held that the verdict was not contrary to the weight of the evidence. *Jones v. State*, 962 So. 2d 1263 (Miss. 2007).

Evidence was sufficient to sustain defendant's conviction for deliberate-design murder because three witnesses stated that defendant confessed to killing the victim, the victim sustained multiple blows to the head, chest, abdomen and back, and a pathologist testified that the amount of force necessary to produce the victim's injuries was unlikely to have been inflicted without an object and most likely was made by contact with a blunt object. *Brown v. State*, 965 So. 2d 1023 (Miss. 2007).

Defendant's murder conviction pursuant to Miss. Code Ann. § 97-3-19(a)(1) was proper because there was sufficient evidence that permitted the jury to find that, before defendant slashed the victim's

throat, he had an appreciable time to plan, and did in fact plan, to kill her. *Craft v. State*, 970 So. 2d 178 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 343, 2008 Miss. LEXIS 89 (Miss. 2008).

Evidence was sufficient to convict defendant of murder under Miss. Code Ann. § 97-3-19(1)(a) because, inter alia: (1) the victim's wife made an in-court identification of defendant as the man with whom the victim had argued after giving defendant and the accomplice-after-the-fact a ride home; (2) the next day, the wife filed a missing person's report in which she reported that the victim was last seen in the company of defendant and his friend; (3) she identified defendant from a photographic lineup; and (4) the accomplice-after-the-fact identified defendant as the killer. *Bailey v. State*, 960 So. 2d 583 (Miss. Ct. App. 2007).

Evidence was sufficient to support defendant's conviction of murder because the testimony of the accessory-after-the-fact showed that: (1) her testimony did not have to be corroborated since she was not an accomplice to the murder; and (2) even assuming that she was an accomplice, her testimony about the murder was corroborated because the forensic pathologist corroborated the accessory-after-the-fact's testimony that the victim was stabbed, the victim's wife testified that defendant was the last person she saw with the victim and stated that they were quarreling when she left the home, and a friend who helped defendant dig a hole in his backyard to supposedly bury a dog never saw a dog, but he did see the heel of a human who was covered by a white sheet. *Bailey v. State*, 960 So. 2d 583 (Miss. Ct. App. 2007).

Defendant's convictions for murder, armed robbery, and shooting into an occupied dwelling were appropriate because the evidence was sufficient: two witnesses testified to seeing defendant shoot the victim; a witness further testified to observing defendant removing the victim's clothing and wallet; and a female testified to a shot being fired through her front door at approximately the time that the victim was shot. *Conner v. State*, 971 So. 2d 630 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2007 Miss. LEXIS 682 (Miss. 2007).

Defendant's conviction for murdering the victim by deliberate design under Miss. Code Ann. § 97-3-19(1)(a) was proper in part because statements that witnesses overheard defendant and the victim make to one another immediately before the fight leading to the victim's death began were relevant to show that defendant intended to fight and might have been in the initial aggressor. *Council v. State*, 976 So. 2d 889 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 977 So. 2d 343, 2008 Miss. LEXIS 74 (Miss. 2008).

Defendant's conviction for murder in violation of Miss. Code Ann. § 97-3-19(1)(a) was appropriate because there was sufficient evidence to support the conviction since there was evidence that defendant repeatedly beat the victim and then proceeded to the kitchen where defendant obtained a knife that he used to repeatedly stab the victim; there was also evidence that defendant took money from the victim after the victim's death to buy more drugs. *McCain v. State*, 971 So. 2d 608 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 244, 2007 Miss. LEXIS 700 (Miss. 2007), writ of certiorari denied by 553 U.S. 1056, 128 S. Ct. 2478, 171 L. Ed. 2d 772, 2008 U.S. LEXIS 4228, 76 U.S.L.W. 3620 (2008).

Where defendant was convicted of murdering a neighbor in violation of Miss. Code Ann. § 97-3-19(1)(a), defendant's motions for a directed verdict, judgment notwithstanding the verdict, and a new trial were properly denied because: (1) the testimony of witnesses and the presence of defendant's DNA at the crime scene were sufficient evidence to allow a rational juror to conclude that the state proved each element of murder; and (2) the jury decided which evidence and testimony was credible and returned a reasonable verdict. *Saucier v. State*, 950 So. 2d 262 (Miss. Ct. App. 2007).

Evidence at trial was sufficient to convict defendant of murder and the conviction was not against the overwhelming weight of the evidence because, inter alia: (1) permissible inferences from the evidence presented at trial included that defendant armed himself, drove to the store, and intentionally killed the victim

without justification; (2) whatever occurred earlier during a fight between the victim and defendant, that fight was over and the jury could find that defendant was in no imminent danger from the victim; and (3) the victim's back was to defendant when he was killed. *Chandler v. State*, 967 So. 2d 47 (Miss. Ct. App. 2006), writ of certiorari denied by 966 So. 2d 172, 2007 Miss. LEXIS 595 (Miss. 2007).

In a trial for depraved heart murder, the trial court properly denied defendant's motion for directed verdict, motion for a new trial, and motion notwithstanding the verdict because the state introduced testimony from six witnesses, who did not know one another, all of whom testified that defendant fired an automatic weapon into a crowd at an event; the victim, who was seated about 30 to 40 yards from defendant, was killed after being struck in the temple by one of the shots. *Johnson v. State*, 950 So. 2d 217 (Miss. Ct. App. 2006).

Evidence was sufficient to sustain a murder conviction because a witness observed defendant threatening to kill the victim, defendant's statement to the police differed from his trial testimony concerning both the time that he left the victim's house and where he was picked up by a friend, and after the murder, defendant fled to Louisiana and acted suspiciously upon his apprehension. *Moffett v. State*, 938 So. 2d 321 (Miss. Ct. App. 2006).

Motion for a directed verdict was denied in a murder case because a rational trier of fact could have found defendant guilty of murder, even though there was no eyewitnesses to a stabbing; defendant alleged that he acted in self-defense, and he argued that a girlfriend's inculpatory testimony was false. *Jones v. State*, 938 So. 2d 312 (Miss. Ct. App. 2006).

Evidence was sufficient to convict defendant of murder because, inter alia, defendant's hypotheses that the automatic weapon was not in his possession during the murder were conflicting and unreasonable, and defendant contended that a reasonable hypothesis consistent with his innocence would be that another individual had motive and opportunity to commit the crimes, but he did not hypothesize any motive that individual might have had for

the shootings or any way the murder weapon might have fallen into the individual's possession and later end up in a bayou. *Jackson v. State*, 943 So. 2d 720 (Miss. Ct. App. 2006).

Where the evidence showed that defendant acted nervous around the time of a shooting, he asked a neighbor to provide a false alibi, he had borrowed a gun from his brother before the shooting and returned it several days after, and no alibi was ever confirmed, there was sufficient evidence to support a conviction for the murder of an ex-girlfriend's new paramour; therefore, a motion for a directed verdict was properly denied. *Sipp v. State*, 936 So. 2d 326 (Miss. 2006).

Motion for judgment notwithstanding the verdict or a new trial was properly denied because there was sufficient evidence to support a conviction for murder based on a deliberate design; the police had been called to a residence to interrupt two domestic disputes prior to the final attack, defendant broke through a door with his bare hands and beat the victim until she fell to the floor, and defendant delivered three fatal blows to the victim while fighting off her son and other family members. *Wilson v. State*, 936 So. 2d 357 (Miss. 2006).

Defendant's convictions for murder and aggravated assault in violation of Miss. Code Ann. § 97-3-19 and Miss. Code Ann. § 97-3-7(2) were proper because there was sufficient evidence from which a rational jury could have concluded that defendant possessed the gun and shot the victim with the gun, without any struggle between the two. *Anthony v. State*, 936 So. 2d 471 (Miss. Ct. App. 2006).

Sufficient evidence existed to convict defendant of murder in violation of Miss. Code Ann. § 97-3-19 as defendant wrote goodbye notes to his daughters asking for forgiveness and the two daughters testified that defendant stabbed the victim and then stabbed himself. *Wash v. State*, 931 So. 2d 672 (Miss. Ct. App. 2006), writ of certiorari dismissed by 937 So. 2d 450, 2006 Miss. LEXIS 544 (Miss. 2006).

51. — — Capital murder.

There was sufficient evidence for the jury to convict defendant of capital murder in violation of Miss. Code Ann. § 97-

3-19(2)(e) and kidnapping in violation of Miss. Code Ann. § 97-3-53 because the jury heard defendant's confession of putting the victim in a headlock and choking him, and the trial court noted that defendant's statement to the police placed him at the scene of the crime and also placed him at the victim's car while the victim was being transported; the verdict was not contrary to the overwhelming weight of the evidence because defendant confessed to choking the victim and helping his co-defendant secure a plastic bag over the victim's head. *McBeath v. State*, 66 So. 3d 663 (Miss. Ct. App. 2010), writ of certiorari denied by 69 So. 3d 9, 2011 Miss. LEXIS 373 (Miss. 2011).

Defendant's convictions for capital murder during the commission of a robbery were proper under Miss. Code Ann. § 97-3-19(2)(e) because the person killed did not have to have an interest in the property taken. *Gillett v. State*, 56 So. 3d 469 (Miss. 2010), writ of certiorari denied by 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944, 80 U.S.L.W. 3355 (U.S. 2011).

In a case in which defendant did not act when he first saw the two victims in bed but instead: (1) returned to his car, (2) retrieved his revolver, (3) knocked on the front door and kicked it in when no one answered, (4) pushed past one victim, (5) shot the first victim and pursued him briefly, and (6) found the second victim and shot her three times, there was sufficient evidence of deliberate design to support his two convictions for capital murder, in violation of Miss. Code Ann. § 97-3-19(1)(a). *Williams v. State*, 29 So. 3d 53 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 116 (Miss. 2010).

After the victim stated that he wanted to have sex with defendant's sister, defendant became enraged, picked up a lead pipe, walked away from the campsite, told two witnesses that he was going to kill the victim, returned to the campsite ten minutes later, and beat the victim in the head repeatedly with the pipe; defendant took the victim's keys and truck, put the body in the truck, drove to Alabama, and put the victim's body on the side of the road. The evidence was sufficient to support

defendant's conviction for capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e). *Woods v. State*, 14 So. 3d 767 (Miss. Ct. App. 2009).

In defendant's trial on a charge of capital murder, the court rejected defendant's claim that the prosecution failed to produce evidence sufficient to convict him of the underlying felony of robbery because defendant's possession of the deceased victim's wallet created a reasonable inference that the property was stolen; the State's theory of the case was that defendant went back to the motel where he and the victim had been staying to get back what was rightfully his—the money in the victim's wallet, and the evidence, although circumstantial, supported this theory. During the State's case-in-chief, evidence was presented to establish that, after defendant left the motel earlier in the day, the victim feared his return, and when defendant did return and was unable to access the room, a motel employee told him that the door was locked from the inside; additional evidence was presented that defendant had received a significant amount of money from his mother for a business that he planned to start and that defendant was supporting the victim and was the source of the cash found inside her wallet. *Goff v. State*, 14 So. 3d 625 (Miss. 2009), modified by 2009 Miss. LEXIS 406 (Miss. Aug. 27, 2009), writ of certiorari denied by 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251, 78 U.S.L.W. 3480 (U.S. 2010).

Sufficient evidence existed to support defendant's conviction for capital murder when the evidence showed defendant was angry with the victim about his employment arrangement with the victim; defendant's girlfriend testified that defendant took the victim's money, credit cards, and car keys during the course of the murder. *Lima v. State*, 7 So. 3d 903 (Miss. 2009).

Because defendant and his brother-in-law acted in concert in assaulting a victim and the victim died, the evidence was sufficient to support defendant's conviction of capital murder even in the absence of evidence that he, and not his brother-in-law, fired the fatal shot. *Moffett v. State*, 3 So. 3d 165 (Miss. Ct. App. 2009).

While the evidence against defendant was not overwhelming, there was suffi-

cient evidence to establish his guilt under Miss. Code Ann. § 97-3-19(2)(e) (Rev. 2006): a witness testified that defendant told him that if he did not get the money to pay his probation officer he was going to “hit the barbershop man up”; the witness stated that the day of the murder he saw defendant in a bloody shirt, and defendant told him that he had just “hit a lick”; the witness testified that he gave defendant the pistol used in the commission of the murder; and, inter alia, another witness testified that he saw defendant walking toward a pathway that led in the direction of the barbershop with a gun prior to the murder. *Mitchell v. State*, 21 So. 3d 633 (Miss. Ct. App. 2008), writ of certiorari denied by 20 So. 3d 680, 2009 Miss. LEXIS 575 (Miss. 2009).

Where the co-indictee testified that he and defendant went to the victim's house to sell him some stones, they gave the victim an empty bag; defendant stabbed the victim and took his wallet which contained \$160. The co-indictee's testimony was sufficient to support defendant's conviction for capital murder; the trial court did not err by denying his motion for a JNOV. *Spurlock v. State*, 13 So. 3d 301 (Miss. Ct. App. 2008), writ of certiorari denied by 14 So. 3d 731, 2009 Miss. LEXIS 343 (Miss. 2009).

Defendant's convictions for robbery and capital murder were appropriate because, while the circuit court erred in allowing references to a deceased codefendant's statement to law enforcement to corroborate defendant's statement, the violation of defendant's constitutional right to confront the witness was harmless since the weight of the evidence was overwhelming. Defendant's own statement confessing to robbing the victim and stabbing him in the abdomen with a screwdriver was entered into evidence; other evidence included an officer's and sheriff's recounting of the “treasure hunt” with the codefendant, where they traveled to various areas and retrieved evidence that corroborated defendant's statement to a “T.” Singleton *v. State*, 1 So. 3d 930 (Miss. Ct. App. 2008).

Evidence was sufficient to convict defendant of capital murder where two witnesses testified that defendant was at the scene of the robbery and murder and that

the contact one witness had with defendant and with the gun during the course of the robbery left the gunshot residue on the witness's hands. *Grant v. State*, 8 So. 3d 213 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 207 (Miss. 2009).

Defendant's conviction for capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e) was appropriate because defendant admitted that he went to an individual's house with the intention of stealing the victim's personal property and further admitted to shooting the victim; he also admitted that the crack cocaine at issue was stolen from the victim. The only dispute was how he came into possession of the crack cocaine and a witness testified that after shooting the victim, defendant rolled the victim over and picked up a pill bottle. *Nelson v. State*, 995 So. 2d 799 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 660 (Miss. 2008).

Defendant's conviction for the capital murder of his brother in violation of Miss. Code Ann. § 97-3-19(2)(d) was appropriate, in part because two witnesses testified that after their failed attempts to murder the brother and his wife in exchange for money, defendant contacted them and told them that he found someone else to complete the job. Thus, defendant's argument that the State failed to meet its burden because there was no direct evidence proving that anything of value was offered or exchanged for the killing of the brother was without merit. *Vickers v. State*, 994 So. 2d 200 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 675 (Miss. 2008).

Evidence was sufficient to find defendant committed a burglary in a capital murder case as there was a pry mark on the front door, the front door was left ajar, a television was missing, and drawers were left open, and defendant was found in possession of the victim's personal property shortly after the burglary. Evidence also showed that defendant broke into the victim's house, killed her, and stole some of her personal belongings because he desired money to purchase drugs, and further testimony established that he sold

the television and used the proceeds to purchase crack. *Young v. State*, 981 So. 2d 308 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 206 (Miss. 2008).

There was sufficient circumstantial evidence to convict defendant of capital murder even without direct evidence because: (1) the witnesses testified that the victim's credit cards were missing after his death, that his pockets were turned inside out, that one card was used at several stores, and that defendant was in each of the stores where the card was used; (2) there was a video of defendant purchasing a television at one of the stores where defendant used the victim's credit card after his death; (3) the evidence was corroborated by defendant's friend who stated that he drove defendant to the different stores and witnessed defendant using the credit cards to purchase items; and (4) when the police told defendant that defendant was being questioned about the stolen credit cards, defendant blurted out that defendant did not kill defendant's uncle even before the police realized that defendant was related to the victim. *Smith v. State*, 984 So. 2d 295 (Miss. Ct. App. 2007).

In a case where defendant slammed his car into a patrol car that was blocking his path during a chase, the evidence was sufficient to support a capital murder conviction under Miss Code Ann. § 97-3-19(2)(a) because it supported the finding that defendant knew the victim was a peace officer at the moment of impact; the officer was standing outside of his vehicle, which was stopped with the blue lights flashing. *White v. State*, 964 So. 2d 1181 (Miss. Ct. App. 2007).

Circuit court did not err in denying defendant's motion for motion for a directed verdict, or defendant's motion for a new trial, because evidence was sufficient to convict defendant of capital murder as a result of felonious abuse of a child under Miss. Code Ann. § 97-3-19(2)(f); from the facts presented in the case, taken in the light most favorable to the verdict, defendant was in charge of caring for a two-year-old child who was healthy and in good condition when she went into defendant's care, and less than two weeks later,

the child was found dead, covered in bruises and abrasions, had lost a significant amount of hair, and had the skin burned off of her feet and ankles. *Berry v. State*, 980 So. 2d 936 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 204 (Miss. 2008).

In a capital murder case, defendant's motion for a new trial and/or judgment notwithstanding the verdict was properly denied because three victims testified they witnessed an assault on a victim, defendant was observed removing the victim from a trunk of a car and leading him into a cornfield, defendant was observed firing a gun six times at the victim, and defendant made incriminating statements about his role in the murder. *Strahan v. State*, 955 So. 2d 968 (Miss. Ct. App. 2007).

In a capital murder case, because there was sufficient evidence, both circumstantial and in the form of a key witness's testimony, for a reasonable jury to find that defendant committed murder during the commission of a robbery, it was not error for the trial court to deny defendant's proposed instruction for a directed verdict. *Ross v. State*, 954 So. 2d 968 (Miss. 2007).

In a case where defendant was convicted of capital murder during the commission of a robbery when he killed his father and stole his father's revolver and car, the jury's verdict was not against the overwhelming weight of the evidence because, *inter alia*: (1) there was testimony that placed defendant at or near the scene of the crime; (2) several area residents testified to hearing loud bangs around the time defendant was at the scene of the crime, and to hearing a car door slam, tires squeal, and a car speed off from the area moments after hearing the unidentified loud bangs; and (3) there was testimony that the revolver found at the scene of defendant's car accident belonged to his father. *Boone v. State*, 964 So. 2d 512 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 515 (Miss. 2007).

There was sufficient evidence to support a capital murder conviction with the underlying felony of robbery due to eyewitness

testimony, the finding of the victim's personal effects that defendant's mother had discarded, the finding of the murder weapon near defendant, the finding of shell casings in defendant's house, and the fact that defendant was found near the victim's stolen vehicle. *Ramsey v. State*, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

Defendant's conviction for capital murder pursuant to Miss. Code Ann. § 97-3-19(2)(f) was appropriate because the state presented substantial evidence that supported the verdict, including testimony that the victim, a child, did not suffer splash burns and that her injuries were consistent with being held or immersed in hot water. *Williams v. State*, 937 So. 2d 35 (Miss. Ct. App. 2006).

III. INSTRUCTIONS.

53. In general.

Inclusion of deliberate-design language included in a jury instruction in defendant's trial for capital murder merely bolstered the State's burden of proof; any error in the language's inclusion was harmless. *Husband v. State*, 23 So. 3d 550 (Miss. Ct. App. 2009), writ of certiorari dismissed by 31 So. 3d 1217, 2010 Miss. LEXIS 218 (Miss. 2010).

Jury was properly instructed as to the elements of the crime charged; defendant was indicted on a charge of capital murder, and the jury instructions properly instructed the jury as to the elements of capital murder and as to what the jury was required to find in order to convict defendant. *Grant v. State*, 8 So. 3d 213 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 207 (Miss. 2009).

53.5. Variance between pleadings and instructions.

Jury was instructed it could find defendant guilty of murder if it found beyond a reasonable doubt that defendant had killed the victim with the deliberate design to effect her death, and not in necessary self-defense, and the murder instruction allowed the jury to return a verdict of guilt if it believed that defendant had killed the victim in some manner other

than by decapitation; the murder instruction was not fatally defective for permitting the jury to find that defendant had killed the victim by any method. *Neal v. State*, 15 So. 3d 388 (Miss. 2009).

In a capital murder case, defendant made no objection to a jury instruction, so his error based on a variance was waived; even if it had not been, the jury was properly instructed to find all the elements required for capital murder where the instructions stated that defendant, acting alone or with another, took personal property from the victim, and during the course of the robbery, the victim was killed. *Ramsey v. State*, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

54.5 Lesser included offenses.

Defendant's burglary conviction was inappropriate because the trial court clearly erred by granting the State's request for an instruction on burglary since burglary was not a lesser-included offense of capital murder and since the State was not entitled to a lesser-offense instruction, Miss. Code Ann. § 97-3-19(2)(e), (3). *Gause v. State*, 65 So. 3d 295 (Miss. 2011).

54.6 — — Depraved heart murder.

Because the Mississippi Supreme Court held that there was no error in coalescing Miss. Code Ann. § 97-3-19(1)(a) and (b), it was not error for a State jury instruction to combine the elements of deliberate-design murder and depraved-heart murder. *Pitts v. State*, 66 So. 3d 174 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 65 So. 3d 310, 2011 Miss. LEXIS 354 (Miss. 2011).

Jury was properly informed on depraved-heart murder and culpable-negligent manslaughter; the court gave depraved-heart murder jury instruction which stated that if the jury found that appellant killed the victim while engaged in the commission of an act eminently dangerous to others and evincing a depraved heart, disregarding the value of human life, whether or not he had any intention of actually killing the victim, then the jury should find appellant guilty

of murder. Culpable negligence was defined as the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as a result of the willful creation of an unreasonable risk thereof and it was negligence of a degree so gross as to be tantamount to a wanton disregard of or utter indifference to the safety of human life; accordingly, the jury instructions given fully explained the difference between depraved-heart murder and culpable-negligence manslaughter. *Westbrook v. State*, 29 So. 3d 828 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 29 So. 3d 774, 2010 Miss. LEXIS 124 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 98, 178 L. Ed. 2d 62, 2010 U.S. LEXIS 5934, 79 U.S.L.W. 3197 (U.S. 2010).

Where defendant was convicted of depraved-heart murder based on firing a gun into a group of fleeing people, even if he had not failed to properly preserve the issue, defendant did not establish error because the trial court's instructions correctly recited the elements of this offense. *Humphries v. State*, 18 So. 3d 305 (Miss. Ct. App. 2009).

In defendant's trial for murder, jury instructions that stated that culpable negligence was conduct which exhibited or manifested a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of defendant's act under the surrounding circumstances as to render his conduct tantamount to willfulness, were proper; the difference in the mental state of culpability came through the jury instructions in that depraved heart murder required a higher mental culpability, i.e., a depraved heart. *Mullen v. State*, 986 So. 2d 320 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 559 (Miss. 2008).

In a case where defendant was charged with capital murder after he slammed his car into a patrol car that was blocking his path during a chase, a trial court did not err by instructing the jury on depraved heart murder because that concept had coalesced with deliberate design murder. *White v. State*, 964 So. 2d 1181 (Miss. Ct. App. 2007).

55. Failure to give manslaughter instruction—where accused fails to request.

During defendant's trial for capital murder, the trial court did not err in failing to give an instruction on manslaughter by culpable negligence because defendant never requested that the instruction for manslaughter be given, and there was no evidentiary basis for the request of a manslaughter-by-culpable-negligence instruction; the State's evidence showed the victim died of strangulation and suffocation by way of a plastic bag duct-taped over his head, and defendant failed to offer any evidence justifying an instruction for manslaughter by culpable negligence. *McBeath v. State*, 66 So. 3d 663 (Miss. Ct. App. 2010), writ of certiorari denied by 69 So. 3d 9, 2011 Miss. LEXIS 373 (Miss. 2011).

57. —Where evidence does not support manslaughter.

Where defendant was convicted of depraved-heart murder based on firing a gun into a fleeing group of people, even if he had not failed to properly preserve the issue, defendant did not establish error from the trial court's failure to instruct on manslaughter because the evidence did not fairly raise this issue. *Humphries v. State*, 18 So. 3d 305 (Miss. Ct. App. 2009).

Where defendant was charged with murder after he disarmed his victim and fired the gun in the victim's direction and into a crowded nightclub, killing the victim and another and wounding three others, defendant was not entitled to a jury instruction on manslaughter because defendant failed to present evidence that he acted in the heat of passion when he fired the gun. Although defendant claimed that the victim had previously shot him, the alleged shooting occurred several days earlier, and nothing in the record suggested that defendant was in a state of violent and uncontrollable rage when he shot the victim. *Roberson v. State*, 19 So. 3d 95 (Miss. Ct. App. 2009).

In a murder case, there was no error in refusing to instruct the jury on manslaughter where defendant was not claiming self-defense at trial, but alleged that someone else committed the crime. *Green*

v. State, 982 So. 2d 471 (Miss. Ct. App. 2008).

In a murder case, defendant's right to a fair trial was not violated when the jury was not instructed on manslaughter under Miss. Code Ann. § 97-3-47 because there was nothing to support a claim that a shooting was accidental where defendant pointed a gun at the victim and shot her from four feet away; moreover, the evidence indicated that defendant acted with malice where defendant and the victim were arguing so much that the victim's daughter was praying for her life prior to the shooting. *Page v. State*, 989 So. 2d 887 (Miss. Ct. App. 2007), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 439 (Miss. 2008).

In a murder case under Miss. Code Ann. § 97-3-19(1)(a), a trial court did not err by refusing to give an instruction on manslaughter despite evidence of abuse, since the evidence did not show that defendant murdered his father in the heat of passion where he had considered killing him; defendant had forged the victim's name on a life insurance policy, bought a gun, used gloves, and shot the victim eight times. *Clemons v. State*, 952 So. 2d 314 (Miss. Ct. App. 2007).

In a murder case, the facts did not support a culpable negligence manslaughter instruction because: (1) although defendant stated he was scared of victim, he followed victim into the woods; (2) defendant's revolver was fired three times; (3) firing the revolver three times was unlikely to be an accident because the gun's trigger actually had to be pulled three times; and (4) witnesses stated that they did not see a struggle for the gun and that defendant pointed the gun at the victim and shot him. *Chandler v. State*, 946 So. 2d 355 (Miss. 2006).

Defendant's murder conviction was upheld because the trial court did not err in rejecting defendant's requested manslaughter instruction, as nothing in defendant's testimony or the testimony of the other witnesses supported an instruction that defendant killed the victim in the heat of passion or in self-defense, and the record was devoid of any evidence indicating that the relationship between defendant and the victim was contentious. *Cot-*

ton v. State, 933 So. 2d 1048 (Miss. Ct. App. 2006).

61. Accessories, accomplices.

By defendant's own admission, corroborated by testimony, defendant was a principal to the crime of murder and thus he could not have been at the same time an accessory after the fact under Miss. Code Ann. § 97-1-5 and defendant was not entitled to an instruction on such. *Williams v. State*, 994 So. 2d 808 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

In a murder case, the trial court did not err in denying defendant's requested cautionary accomplice jury instruction because defendant's friend was an accessory-after-the-fact, not an accomplice, because she did not agree with defendant to murder the victim, but: (1) she was the lookout during the burial of the victim; (2) she helped defendant clean his bloody body; (3) she saw the victim lying dead by her truck; and (4) she kept quiet about the murder for more than a year until she was confronted by police. *Bailey v. State*, 960 So. 2d 583 (Miss. Ct. App. 2007).

In a murder case under Miss. Code Ann. § 97-3-19(1)(a), a trial court did not err by refusing to give a cautionary instruction based on the testimony of an accomplice; the testimony of defendant's girlfriend was not unreasonable, self contradictory or substantially impeached, and there was no question as to defendant's guilt since he confessed to the murder of his father. *Clemons v. State*, 952 So. 2d 314 (Miss. Ct. App. 2007).

In a capital murder case, a trial court did not err by refusing to give a cautionary instruction regarding accomplice liability since an eyewitness was charged as an accessory after the fact; moreover, the testimony was corroborated with evidence, such as shell casings found in defendant's home, stolen vehicle keys found on defendant's person, and the finding of the murder weapon near where defendant was arrested. *Ramsey v. State*, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

63. Peremptory instructions.

In a murder case under Miss. Code Ann. § 97-3-19(1)(a) the evidence was suffi-

cient where defendant, a bail bondsman, was owed money by the victim, defendant talked about killing the victim, the victim was picked up by defendant shortly before the shooting, defendant drove by the murder scene, and defendant confessed. Therefore, a peremptory instruction was properly denied. *Green v. State*, 982 So. 2d 471 (Miss. Ct. App. 2008).

64. Defendant's theory of defense.

Culpable negligence manslaughter and heat-of-passion jury instructions were properly refused in defendant's murder trial, although manslaughter was the defense's theory of the case, because defendant's theory was without foundation in the evidence where defendant's conduct was deliberate when after leaving the scene of an altercation with the victim's father, defendant went home and retrieved a semiautomatic weapon, returned, and fired multiple times into the victim's apartment. *Keys v. State*, 33 So. 3d 1143 (Miss. Ct. App. 2009), writ of certiorari denied by 34 So. 3d 1176, 2010 Miss. LEXIS 228 (Miss. 2010).

Where defendant disarmed his victim and fired the gun in the victim's direction and into a crowded nightclub, killing the victim and another and wounding three others, defendant was not entitled to a jury instruction on accident and misfortune at his trial because defendant acted intentionally and an intention act could not be excused under the doctrine of accident and misfortune. *Roberson v. State*, 19 So. 3d 95 (Miss. Ct. App. 2009).

Where defendant disarmed his victim and fired the gun in the victim's direction and into a crowded nightclub, killing the victim and another and wounding three others, the trial court did not err in refusing to instruct the jury on culpable negligence because the evidence did not support defendant's assertion that he lacked the requisite malice needed to sustain a murder conviction as to the second murder victim. Even if defendant did not intend to specifically kill the second victim, his actions were willful and under circumstances that were likely to result in death or serious bodily injury. *Roberson v. State*, 19 So. 3d 95 (Miss. Ct. App. 2009).

66. Malice or deliberate design.

Defendant's right to a fair trial was not violated by a jury instruction given in a

capital murder case because it was not required to include a finding on deliberate design since there was no intent to kill required when a person was slain in the course of a robbery. *Ramsey v. State*, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

67. Self-defense.

Where defendant disarmed his victim and fired the gun in the victim's direction and into a crowded nightclub, killing the victim and another and wounding three others, defendant was not entitled to a self-defense instruction at his trial on a charge of murder because defendant failed to establish that he feared for his life when he fired into the nightclub. *Roberson v. State*, 19 So. 3d 95 (Miss. Ct. App. 2009).

There was no merit to defendant's claim that a trial court peremptorily found him guilty of burglary by prohibiting him from arguing self-defense where the underlying crime that he was charged with to elevate his murder charge to capital murder under Miss. Code Ann. § 97-3-19(2)(e) was burglary under Miss. Code Ann. § 97-17-23, and Mississippi adhered to the common law rule that an aggressor was precluded from pleading self-defense. As a result, the trial court did not err in denying defendant's attempt to argue self-defense at trial. *Beale v. State*, 2 So. 3d 693 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 90 (Miss. 2009).

68. Miscellaneous.

Trial court did not err by granting a jury instruction that combined deliberate design murder with depraved heart murder because the Mississippi Supreme Court held that it was not error to grant a jury instruction which combined the elements of deliberate design murder with the elements of depraved heart murder as stated in Miss. Code Ann. §§ 97-3-19(1)(a) and (1)(b), and there was evidence to support a jury instruction for murder because (1) the State produced evidence showing that defendant was the person who shot his stepson and shot and killed his wife, (2) defendant himself admitted that he perpetrated the shooting, and (3) the State

produced evidence of depraved heart murder by establishing that while defendant was engaged in an argument with his wife, he fired shots inside an apartment that contained unarmed individuals and several children. *Readus v. State*, 997 So. 2d 941 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 27 (Miss. 2009).

Where appellant was convicted of capital murder while in the commission of a robbery, it was not error to deny a requested jury instruction on the *Weathersby* rule, because (1) the rule was inapplicable since appellant's statements to officers following appellant's arrest were clearly inconsistent with appellant's testimony at trial, and (2) application of the rule was for the court to decide. *Fryou v. State*, 987 So. 2d 461 (Miss. Ct. App. 2008).

Where appellant was convicted of capital murder while in the commission of a robbery, it was not error to deny appellant's requested lesser-included offense jury instruction on manslaughter, because (1) appellant admitted the killing and the robbery so appellant's intent was irrelevant, and (2) the only evidence to support heat of passion was a single comment by the victim about appellant's girlfriend. *Fryou v. State*, 987 So. 2d 461 (Miss. Ct. App. 2008).

Where appellant was convicted of capital murder while in the commission of a robbery, it was not error to deny a requested jury instruction on simple murder, because there was sufficient evidence to convict appellant of capital murder and there was no evidence that would have allowed a jury to convict appellant of simple murder and not find capital murder since appellant admitted that appellant took the victim's truck and told officers that appellant took the victim's wallet. *Fryou v. State*, 987 So. 2d 461 (Miss. Ct. App. 2008).

Three defendants' capital-murder convictions pursuant to Miss. Code Ann. § 97-3-19(2)(e) were appropriate because, although a limiting instruction given to the jury regarding confessions by defendants was not sufficient, no prejudice or manifest injustice resulted as to any defendant; each of the defendants gave suf-

ficient evidence of his individual participation in the robbery of a gun store in his separate statements to support a capital-murder charge. *Anderson v. State*, 5 So. 3d 1088 (Miss. Ct. App. 2007), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 171 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 184 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 177 (Miss. 2009).

In a capital murder case, the fact that the phrase “without authority of law” was not read to the jurors did not mean that the instructions were erroneous because, reading the instructions as a whole, the jury was properly informed of the requisite findings and the proof needed to sustain a conviction. *Ramsey v. State*, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

In a capital murder case, a trial court did not err by refusing to give a lesser included offense instruction or by refusing to give a simple murder instruction; aggravated assault was not a lesser included or related offense of robbery, the evidence did not support an obstruction of justice charge, and defendant did not request a simple murder instruction. *Ramsey v. State*, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

71. Instructions properly denied.

Conviction for depraved-heart murder was supported by the evidence. Defendant was not acting in the heat of passion, and thus, a manslaughter conviction was not warranted by the evidence, as defendant’s own testimony showed that he was not provoked by the victim; he argued merely that he had no part in the victim’s murder. *Leggett v. State*, 54 So. 3d 317 (Miss. Ct. App. 2011).

In defendant’s murder trial, the trial court did not err in refusing to instruct the jury on the lesser offense of culpable negligence manslaughter because the instruction indicated that the jury could find defendant guilty of the lesser offense if it found that defendant fired his gun toward a group of people and inadvertently hit the victim but defendant unequivocally

testified that he targeted the victim and deliberately shot him. *McKinney v. State*, 26 So. 3d 1065 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 48 (Miss. 2010).

In defendant’s murder trial, the trial court did not err in refusing to instruct the jury on the lesser offense of heat of passion manslaughter because defendant’s proposed instruction advised the jury that it could convict defendant of the lesser offense if it found that defendant acted impulsively in the heat of passion after arguing with the victim but no evidence was introduced that defendant ever spoke with the victim and defendant himself testified that he shot the victim because he was getting into an automobile. *McKinney v. State*, 26 So. 3d 1065 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 48 (Miss. 2010).

Trial court did not err in refusing to give a lesser-included offense instruction on manslaughter. Defendant was charged with capital murder during the commission of a robbery, a violation of Miss. Code Ann. § 97-3-19; whether defendant intended to kill the victim was irrelevant. *Banyard v. State*, 47 So. 3d 708 (Miss. Ct. App. 2009), reversed by, remanded by 47 So. 3d 676, 2010 Miss. LEXIS 475 (Miss. 2010).

Defendant was not improperly denied heat-of-passion or imperfect self-defense manslaughter jury instructions during his capital murder trial where there was no evidence presented that words were exchanged between defendant and his girlfriend once defendant entered her apartment, and testimony established that defendant hit the girlfriend very quickly upon entering her apartment. Defendant admitted kicking in the door to the apartment, knocking the girlfriend unconscious for a short period of time, and spotting the murder victim in the bedroom, and although he claimed that the murder victim pulled a gun on him, forcing him to resort to self-defense, the gun that the murder victim was alleged to have brandished was never presented at trial. *Beale v. State*, 2 So. 3d 693 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 90 (Miss. 2009).

In defendant's trial for murder in violation of Miss. Code Ann. § 97-3-19(1)(a) and aggravated assault in violation of Miss. Code Ann. § 97-3-7(2)(b), defendant was not entitled to have the requested jury instructions on the lesser-included offense of manslaughter under Miss. Code Ann. § 97-3-35 because defendant requested a self-defense instruction, while the definition of manslaughter required that it was not in necessary self-defense, and there was no evidentiary basis of provocation of a degree to evoke an uncontrolled response of anger, rage, hatred,

furious resentment or terror. *McCune v. State*, 989 So. 2d 310 (Miss. 2008).

In a murder case, there was no error in refusing to give an instruction regarding the jury assessing the weight and credibility of the witnesses and an instruction allowing the consideration of whether defendant's taped statements were made of his own free will. The trial judge did not want to single out portions of the evidence and call attention to them; moreover, another instruction covered the jury's function. *Green v. State*, 982 So. 2d 471 (Miss. Ct. App. 2008).

§ 97-3-21. Homicide; penalty for murder or capital murder.

JUDICIAL DECISIONS

1. Validity.
2. Construction and application; generally.
3. Sentencing factors.
10. Sentencing Hearings.

1. Validity.

Defendant's mandatory life sentence, imposed pursuant to Miss. Code Ann. § 97-3-21 after his murder conviction, was not cruel and unusual punishment for purposes of U.S. Const. amend. VIII and Miss. Const. art. 3, § 28 even though defendant was 14 years old at the time of the offense because Miss. Code Ann. § 97-3-21 did not afford the trial judge any sentencing discretion or make an exception for a defendant of tender years. *Evans v. State*, — So. 2d —, 2011 Miss. App. LEXIS 343 (Miss. Ct. App. June 14, 2011).

Defendant asserted that he was improperly sentenced to life imprisonment without the possibility of parole for murder; however, that was the sentence for capital murder. Because defendant was only sentenced to life imprisonment, not to life without the possibility of parole, under Miss. Code Ann. § 97-3-21, defendant's sentence for murder under Miss. Code Ann. § 97-3-19(1) was proper. *Staten v. State*, 989 So. 2d 938 (Miss. Ct. App. 2008), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 400 (Miss. 2008).

Appellant's motion for post-conviction relief was properly denied as untimely

filed because appellant's sentence of life without parole, under Miss. Code Ann. § 97-3-21, following his plea of guilty to capital murder, did not violate his constitutional right against ex post facto application of the law because (1) the Supreme Court of Mississippi previously held that the imposition of the new sentencing option of life without parole did not violate the prohibition against ex post facto laws, and (2) sentencing under Miss. Code Ann. § 97-3-21 clearly and lawfully directed capital defendants whose pretrial, trial, or resentencing proceedings took place after July 1, 1994, to have their sentencing juries given the option of life without parole in addition to life with the possibility of parole and death. *Randall v. State*, 987 So. 2d 453 (Miss. Ct. App. 2008).

Trial court properly dismissed defendant's post-conviction motion without a hearing where defendant's post-conviction motion revealed that he knew the sentence he would get for murder, which was a mandatory sentence of life imprisonment, as required by Miss. Code Ann. § 97-3-21; no promises regarding parole or a specific lesser sentence had been made to him. *Booker v. State*, 954 So. 2d 448 (Miss. Ct. App. 2006).

2. Construction and application; generally.

Defendant's sentence of life imprisonment without parole exceeded the statutory maximum under Miss. Code Ann.

§ 97-3-21 where defendant was indicted and convicted of deliberate-design murder pursuant to Miss. Code Ann. § 97-3-19. *Parker v. State*, 30 So. 3d 1222 (Miss. 2010).

Defendant's sentence of life imprisonment without eligibility for parole after he was convicted of murder was proper because he was convicted of the violent crime of murder after January 1, 2000, and was not eligible for parole; nor did the appellate court find that his sentence was grossly disproportionate to the crime committed. *Fannings v. State*, 997 So. 2d 953 (Miss. Ct. App. 2008).

Trial court erred in not instructing the jury that life without the possibility of parole was an option under Miss. Code Ann. § 97-3-21 because, while the crime occurred prior to the amendment adding that option, the trial took place after the amendment, and under Miss. Code Ann. § 99-19-1, it had previously been held that § 97-3-21 clearly and lawfully directed capital defendants whose pre-trial, trial or resentencing proceedings took place after July 1, 1994, to have their sentencing juries given the option of life without parole in addition to life with the possibility of parole and death. *Rubenstein v. State*, 941 So. 2d 735 (Miss. 2006).

3. Sentencing factors.

In a post-conviction relief proceeding in which a pro se state inmate had been indicted for capital murder and pled guilty to the reduced charge of murder, in violation of Miss. Code Ann. § 97-3-19(1)(a), the only exception that he alleged allowed him to file a successive writ was the existence of an intervening decision. With regard solely to his proposed unconstitutional life sentence, he argued that the *Apprendi* decision and the *Blakely* deci-

sion satisfied the intervening-decision exception; however, those decisions did not provide any support for his claim since life was the only sentence available under Miss. Code Ann. § 97-3-21. *Glass v. State*, 45 So. 3d 1200 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 636, 2010 Miss. LEXIS 554 (Miss. 2010).

Defendant's argument that it was error for the trial court to sentence him to life in prison without possibility of parole was improper; after the trial court set aside the jury's sentence of death, it had only one choice, which was the lesser sentence of life without the possibility of parole. Sentences that did not exceed the maximum term allowed by statute are not considered grossly disproportionate and are not disturbed on appeal. *Maye v. State*, 49 So. 3d 1140 (Miss. Ct. App. 2009), vacated by, remanded by 49 So. 3d 1124, 2010 Miss. LEXIS 622 (Miss. 2010).

Defendant's life sentence for murder under Miss. Code Ann. § 97-3-21 was not cruel and unusual punishment because the jury was instructed on the crimes of murder and manslaughter, the jury could have properly found defendant guilty of murder without defendant's actually having fired the gun that killed the victim, and the sentence did not exceed the statutory maximum. *Trotter v. State*, 9 So. 3d 402 (Miss. Ct. App. 2008).

10. Sentencing Hearings.

Death sentence was properly imposed pursuant to Miss. Code Ann. § 97-3-21 because petitioner inmate did not have the right to present evidence at sentencing—specifically evidence that he did not commit rape—that was inconsistent with the verdict of the guilt-phase jury. *Holland v. Anderson*, 583 F.3d 267 (5th Cir. 2009), writ of certiorari denied by 130 S. Ct. 2100, 176 L. Ed. 2d 731, 2010 U.S. LEXIS 3429, 78 U.S.L.W. 3610 (U.S. 2010).

§ 97-3-25. Homicide; penalty for manslaughter.

JUDICIAL DECISIONS

2. Penitentiary sentences.
4. Not cruel and unusual.

2. Penitentiary sentences.

Manslaughter statute, Miss. Code Ann. § 97-3-25, allowed sentences of up to twenty years; defendant was sentenced to 20 years, and therefore because his claim that the trial court failed to address the issue of whether his sentence was excessive for a first-time offender was so completely meritless upon its face, there was no clear error in the trial court's failure to address it directly. *Brown v. State*, 944 So. 2d 103 (Miss. Ct. App. 2006), writ of certiorari denied by 946 So. 2d 368, 2006 Miss. LEXIS 732 (Miss. 2006).

Appellate court affirmed defendant's sentence for 15 years after pleading guilty

to manslaughter under Miss Code Ann. § 97-3-47 because Miss. Code Ann. § 97-3-25 provided that the sentencing range was two to 20 years. *Henderson v. State*, 929 So. 2d 391 (Miss. Ct. App. 2006).

4. Not cruel and unusual.

Even though an appellate court was precluded from addressing a claim of cruel and unusual punishment under the Eighth Amendment because it was not raised to a trial court in a manslaughter case, the issue was without merit in any event because a sentence of twenty years with four years suspended was within the range set forth in Miss. Code Ann. § 97-3-25. *Brown v. State*, 970 So. 2d 1300 (Miss. Ct. App. 2007).

§ 97-3-27. Homicide; killing while committing felony.

JUDICIAL DECISIONS

1. In general.
4. Evidence; generally.
6. Instructions.

1. In general.

Even though an inmate did not admit to killing a victim, there was still a sufficient factual basis for a plea where he entered a plea of guilty to manslaughter and stated the plea was in his best interest. *Hull v. State*, 933 So. 2d 315 (Miss. Ct. App. 2006).

4. Evidence; generally.

Weight of the evidence did not support a manslaughter conviction rather than a murder conviction because defendant failed to detail what he considered "sufficient provocation," and his sister testified that the victim had gotten up and had began walking into the kitchen when defendant ran and grabbed the victim from behind. There was no testimony that the victim had a weapon and there was no testimony that defendant had to use deadly force under the circumstances. *Ravencraft v. State*, 989 So. 2d 437 (Miss. Ct. App. 2008).

Evidence was sufficient to support defendant's manslaughter conviction because: (1) a witness testified that after the argument and defendant and the victim left in their vehicles, when the victim attempted to pass defendant's truck, defendant "cut over" on him, looking back through the window before doing so; (2) other witnesses testified as to the argument and the accident; (3) and an officer testified that defendant admitted that he and the victim had an argument, that he drove down the middle of the road to prevent the victim from passing him, that he would get over when the victim tried to pass, until the last time when he turned the wheel too far and lost control of his truck. *Bell v. State*, 963 So. 2d 1124 (Miss. 2007).

6. Instructions.

Trial court did not err in refusing to give a lesser-included offense instruction on manslaughter; Miss. Code Ann. § 97-3-27 precluded a manslaughter instruction for those felonies specifically enumerated in Miss. Code Ann. § 97-3-19(2)(e), one of

which was robbery. Defendant was charged with capital murder during the commission of a robbery, a violation of Miss. Code Ann. § 97-3-19; whether defendant intended to kill the victim was

irrelevant. *Banyard v. State*, 47 So. 3d 708 (Miss. Ct. App. 2009), reversed by, remanded by 47 So. 3d 676, 2010 Miss. LEXIS 475 (Miss. 2010).

§ 97-3-31. Homicide; killing unnecessarily, while resisting effort of slain to commit felony or do unlawful act.

JUDICIAL DECISIONS

2. What constitutes unlawful act; generally.
4. Questions for jury.
5. Instructions.

2. What constitutes unlawful act; generally.

Verdict of murder under Miss. Code Ann. § 97-3-19 was not against the overwhelming weight of the evidence as the testimony presented a factual dispute for the jury's resolution and the jury found certain testimony to be credible and defendant's attempts to establish a self-defense theory to be contradictory; although defendant cited to Miss. Code Ann. § 97-3-31, which provided for a manslaughter conviction when one killed another while resisting a felony, there was conflicting testimony as to whether the victim was attempting to commit a felony, and although defendant also cited to Miss. Code Ann. § 97-3-35 and claimed the evidence supported a heat of passion manslaughter conviction, there was no evidence that defendant was acting in a state of violent and uncontrollable rage and he only attempted to show that he was afraid of the victim and acted in self-defense. *Ray v. State*, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

4. Questions for jury.

Evidence established the elements of murder beyond a reasonable doubt; appellant armed himself with a baseball bat with the intent to cause serious bodily injury or death to the victim and struck an unarmed victim in the head three times with the baseball bat, the first of which would have knocked him unconscious and defenseless. These actions resulted in the

victim's death; the victim was not in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered the business when appellant began attacking the victim. *Westbrook v. State*, 29 So. 3d 828 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 29 So. 3d 774, 2010 Miss. LEXIS 124 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 98, 178 L. Ed. 2d 62, 2010 U.S. LEXIS 5934, 79 U.S.L.W. 3197 (U.S. 2010).

5. Instructions.

Where a witness testified that he did not see the victim make any threatening movements before defendant drew his pistol and shot the victim, defendant was convicted of murder. The trial court did not err by denying defendant's proposed instructions on heat-of-passion manslaughter under Miss. Code Ann. § 97-3-31; although the words "heat of passion" were not included in the jury instructions, the jury had the option of finding defendant guilty of manslaughter. *Smith v. State*, 20 So. 3d 12 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 520 (Miss. 2009).

Defendant's convictions for two counts of murder were proper because defendant never claimed that he was entitled to a manslaughter instruction because a jury could have found that he killed the victims while resisting their attempt to hold him hostage. Defendant clearly argued that self-defense should have been available for the jury's consideration and that he was entitled to a manslaughter instruction because a jury could have found that he was entitled to use some force but that he used more force than was necessary. *Neese v. State*, 993 So. 2d 837 (Miss. Ct. App. 2008).

§ 97-3-35. Homicide; killing without malice in the heat of passion.

JUDICIAL DECISIONS

1. In general.
3. Provocation.
4. Self-defense.
6. Evidence; generally.
7. — Warranting manslaughter.
- 7.5 — Not warranting manslaughter.
9. Instructions; generally.
10. — Warrantableness of manslaughter instructions.
11. — — Where evidence justifies murder conviction.
13. — Request for instructions.

1. In general.

Factual basis existed for defendant's guilty pleas where the factual summary expressed by the State, and agreed to by defendant, satisfied all elements of both crimes of manslaughter, Miss. Code Ann. § 97-3-35, and armed robbery, Miss. Code Ann. § 97-3-79; it showed that defendant intended to take the victim's automobile through the exhibition of a deadly weapon and it further demonstrated that defendant did, in fact, take the victim's automobile by shooting the victim and the victim died as a result of his wounds. *Keith v. State*, 999 So. 2d 383 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 52 (Miss. 2009).

Defendant's convictions for three counts of manslaughter for his actions in 1964 were appropriate in part because there was no statute of limitations on manslaughter in Mississippi. *Killen v. State*, 958 So. 2d 172 (Miss. 2007).

Sufficient evidence existed to convict defendant of murder in violation of Miss. Code Ann. § 97-3-19 as defendant wrote goodbye notes to his daughters asking for forgiveness and the two daughters testified that defendant stabbed the victim and then stabbed himself; thus, the jury did not err by not convicting defendant of manslaughter instead. *Wash v. State*, 931 So. 2d 672 (Miss. Ct. App. 2006), writ of certiorari dismissed by 937 So. 2d 450, 2006 Miss. LEXIS 544 (Miss. 2006).

3. Provocation.

Reasonable fact-finder could have found that defendant had acted in the heat of passion when he killed his father as there was sufficient evidence that, in the days preceding the shooting, defendant was in a constant state of agitation, predicated upon his father's comments regarding his sexuality and the fact that defendant was especially sensitive to such statements because of earlier life experiences. *Nolan v. State*, 61 So. 3d 887 (Miss. 2011).

Verdict of murder under Miss. Code Ann. § 97-3-19 was not against the overwhelming weight of the evidence as the testimony presented a factual dispute for the jury's resolution and the jury found certain testimony to be credible and defendant's attempts to establish a self-defense theory to be contradictory; although defendant cited to Miss. Code Ann. § 97-3-31, which provided for a manslaughter conviction when one killed another while resisting a felony, there was conflicting testimony as to whether the victim was attempting to commit a felony, and although defendant also cited to Miss. Code Ann. § 97-3-35 and claimed the evidence supported a heat of passion manslaughter conviction, there was no evidence that defendant was acting in a state of violent and uncontrollable rage and he only attempted to show that he was afraid of the victim and acted in self-defense. *Ray v. State*, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

In defendant's trial for murder, defendant's act of shooting the victim in the head at short range did not qualify as heat of passion of manslaughter because while the conversation might have been heated with defendant's mother, the victim was a mere bystander to it; the victim's statement that defendant and defendant's mother needed to quit fighting did not cause a normal mind to be roused to the extent that reason was overthrown and that passion usurped the mind destroying

judgment. *Mullen v. State*, 986 So. 2d 320 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 559 (Miss. 2008).

4. Self-defense.

Defendant's conviction for manslaughter was proper under Miss. Code Ann. § 97-3-35 because the evidence was sufficient since a jury could have reasonably found that defendant did not act in necessary self-defense. Defendant admitted that he grabbed a victim, a 61-year-old man in less-than-good health, by the wrists, had pulled the victim towards him, and had struck him three times on the side of the head; uncontradicted physical evidence showed that the victim died of blunt-force trauma to his head. *Booker v. State*, 64 So. 3d 965 (Miss. 2011).

Defendant's conviction for manslaughter was proper because it was up to the jury to determine whether defendant acted reasonably in necessary self-defense when he shot the victim in the head. The jury could have determined that defendant did not act in necessary self-defense because, at that time, the victim was on the floor and did not present a reasonable threat to defendant's life. *Rogers v. State*, 994 So. 2d 792 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 668 (Miss. 2008).

Defendant's conviction for manslaughter was appropriate because the evidence indicated that in the middle of the fight with the victim, defendant left and then returned with a knife; that was sufficient evidence for the jury to determine that defendant was not acting in self-defense. *Lindsey v. State*, 965 So. 2d 712 (Miss. Ct. App. 2007).

Sufficient evidence was adduced at trial to support a finding that defendant's murder of the victim was not done in self-defense, even though defendant testified that the victim had previously choked defendant, to the point that defendant felt that he was going to die; the evidence was sufficient to find defendant guilty of manslaughter. *Harris v. State*, 937 So. 2d 474 (Miss. Ct. App. 2006).

6. Evidence; generally.

Defendant was properly convicted of manslaughter of his brother, pursuant to

Miss. Code Ann. § 97-3-35, because any evidentiary error was harmless; defendant was not prohibited from presenting his self-defense theory at trial for consideration by the jury. *Graves v. State*, 45 So. 3d 283 (Miss. Ct. App. 2010).

Defendant's conviction for murdering his girlfriend was appropriate because defendant's friend, who was the only eyewitness to the incident, testified that defendant deliberately shot the victim in the head at point-blank range. Deliberate design to kill a person could be formed very quickly and the friend further recounted no "heat of passion" element to forward a possible manslaughter conviction; defendant also did not produce any evidence to that effect. *Fannings v. State*, 997 So. 2d 953 (Miss. Ct. App. 2008).

Defendant's conviction of culpable negligence manslaughter was supported by sufficient evidence because the evidence enabled the jury to reasonably conclude that defendant pointed a loaded, cocked gun at the victim's head and pulled the trigger. *Johnson v. State*, 997 So. 2d 256 (Miss. Ct. App. 2008).

Where an eyewitness stated that defendant stabbed a victim, a murder weapon was found, and a doctor who performed the autopsy stated that it would have been nearly impossible for the victim to have inflicted such a wound upon herself, there was sufficient evidence to support a manslaughter conviction under Miss. Code Ann. §§ 97-3-35, 97-3-47. There was no need to give a circumstantial evidence instruction based on the direct testimony of the eyewitness. *Brown v. State*, 970 So. 2d 1300 (Miss. Ct. App. 2007).

Reasonable juror could have found defendant guilty of manslaughter based on the evidence presented; therefore, the verdict was not so contrary to the weight of the evidence, nor had manifest error been committed. *Nichols v. State*, 965 So. 2d 770 (Miss. Ct. App. 2007).

Evidence was sufficient to support defendant's manslaughter conviction under Miss. Code Ann. § 97-3-35 because the testimony from the state's witnesses indicated that: (1) the victim had no weapon; (2) defendant and the victim began fighting; (3) the victim suffered a fatal stab wound to the chest sometime during the

fight; (4) defendant left the scene immediately; and (5) defendant initiated the fight; defendant's own witness testified that the victim was uninjured before the fight with defendant, and no evidence was presented indicating that anyone else was involved in the fight. *White v. State*, 962 So. 2d 728 (Miss. Ct. App. 2007).

Weight of the evidence supported defendant's manslaughter conviction under Miss. Code Ann. § 97-3-35 because the evidence was clear that the victim was uninjured prior to his encounter with defendant, and that after the encounter he was bleeding to death from a stab wound to the chest; the only evidence that the victim possessed a knife was defendant's testimony, and a witness testified that the victim did not have a knife. *White v. State*, 962 So. 2d 728 (Miss. Ct. App. 2007).

Where defendant challenged the sufficiency and the weight of the evidence, the trial court properly denied defendant's motion for a directed verdict and his motion for a new trial and found him guilty of manslaughter because: (1) there was evidence that could create a reasonable inference that defendant retrieved an object from his vehicle and then stabbed the victim; (2) the evidence supported a conclusion that defendant was not under attack from the victim, and even that defendant advanced on the victim after the fight had ended; (3) the victim died from excessive bleeding due to a stab wound to his lower chest; and (4) a jury could have found defendant guilty of killing the victim in a cruel or unusual manner or by the use of a dangerous weapon, without the authority of law, and not in necessary self-defense. *Brownlee v. State*, 950 So. 2d 1063 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 365 (Miss. 2007).

7. — Warranting manslaughter.

Defendant's manslaughter conviction in violation of Miss. Code Ann. § 97-3-35 was proper because his version of the incident satisfied the elements of manslaughter; therefore, the circuit court was within its discretion to determine that the *Weathersby* rule did not apply. *Booker v. State*, 64 So. 3d 988 (Miss. Ct. App. 2010), affirmed by 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Defendant's manslaughter conviction was appropriate because the evidence was sufficient. When viewing the testimony of his mother in a light most favorable to the prosecution, defendant acted wholly without authority of law in stabbing the victim, his mother's boyfriend, in the neck with a kitchen knife. According to the mother, her boyfriend did not try to hit defendant; the boyfriend only tried to close the bedroom door after defendant somehow unlocked his mother's bedroom door. *Martin v. State*, 43 So. 3d 504 (Miss. Ct. App. 2010).

Defendant's manslaughter conviction, pursuant to Miss. Code Ann. § 97-3-35, was supported by sufficient evidence because both versions of the shooting in evidence at trial supported the conclusion that defendant's use of deadly force was either unnecessary or premature and was not exercised in necessary self-defense, as defined in Miss. Code Ann. § 97-3-15(f). *Pruitt v. State*, 28 So. 3d 585 (Miss. 2010).

Where defendant admitted to deputies and investigator that he had shot the victim, but claimed the death was an accident, following a minor argument, and that he and the victim were playing with the gun when it discharged, viewing the evidence in the light most favorable to the verdict, there was sufficient evidence supporting the jury verdict of manslaughter under Miss. Code Ann. § 97-3-35. *Barfield v. State*, 22 So. 3d 1175 (Miss. 2009).

Evidence was sufficient to convict defendant of manslaughter under Miss. Code Ann. § 97-3-35 as she was the only other person in the house, a deadly weapon was used, there was no evidence of self-defense, and scientific evidence of the gunshot wound showed that the victim could not have inflicted it himself, either by accident or suicide. Further, there was no prejudice to defendant as she was convicted of the lesser-included offense where proof would have supported conviction of the greater offense of deliberate-design murder. *Simpson v. State*, 993 So. 2d 400 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 552 (Miss. 2008), writ of certiorari denied by 555 U.S. 1188, 129 S. Ct. 1348, 173 L. Ed. 2d 614, 2009 U.S. LEXIS 1379, 77 U.S.L.W. 3469 (2009).

Where an inmate pled guilty to murder, but argued that it was a “crime of passion,” it was not error to deny the inmate’s motion for the production of the transcript of the partial trial because the inmate improperly equated a “crime of passion” with a killing in the heat of passion, and there was nothing to suggest that the victim did anything in the moments prior to death to provoke or arouse sufficient passion to cause the inmate to kill the victim in a moment of rage. *Lawrence v. State*, 970 So. 2d 1291 (Miss. Ct. App. 2007).

There was sufficient evidence to support a conviction for murder under Miss. Code Ann. § 97-3-19(1)(a), rather than manslaughter under Miss. Code Ann. § 97-3-35, where the facts showed that defendant had been having domestic problems with his wife, he cashed a check for a large sum of money, and then went to her work where he shot her to death. *Bennett v. State*, 956 So. 2d 964 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 2007 Miss. LEXIS 293 (Miss. May 17, 2007).

Verdict was not against the overwhelming weight of the evidence, and therefore defendant’s manslaughter conviction was affirmed, because there was significant evidence from which the jury could have found that defendant did not shoot the victim in self-defense, including direct and circumstantial evidence contradicting defendant’s version of the incident, including the facts that no gun or jacket were found on the victim and defendant’s statement that he shot the victim because he did not want to “tussle.” *Smith v. State*, 945 So. 2d 414 (Miss. Ct. App. 2006).

Evidence was sufficient to support defendant’s conviction because: (1) the evidence was undisputed that the victim was killed with a pistol; (2) both the state and the defense presented evidence that an argument took place before the shooting occurred; and (3) the state presented evidence that defendant shot the victim as a matter of convenience and that he and his girlfriend attempted to cover-up the shooting. *Smith v. State*, 945 So. 2d 414 (Miss. Ct. App. 2006).

7.5 — Not warranting manslaughter.

Defendant’s murder conviction was appropriate because he was not entitled to a

manslaughter instruction under Miss. Code Ann. § 97-3-35. Defendant failed to produce any evidence showing that he was in a state of violent or uncontrolled rage or that he had been provoked. *Whittington v. State*, 49 So. 3d 107 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 636 (Miss. 2010).

After the victim stated that he wanted to have sex with defendant’s sister, defendant became enraged, picked up a lead pipe, walked away from the campsite, told two witnesses that he was going to kill the victim, returned to the campsite ten minutes later, and beat the victim in the head repeatedly with the pipe; defendant took the victim’s keys and truck, put the body in the truck, drove to Alabama, and put the victim’s body on the side of the road. The evidence was sufficient to support defendant’s conviction for capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e), rather than manslaughter under Miss. Code Ann. § 97-3-35. *Woods v. State*, 14 So. 3d 767 (Miss. Ct. App. 2009).

9. Instructions; generally.

In defendant’s trial for murder in violation of Miss. Code Ann. § 97-3-19(1)(a) and aggravated assault in violation of Miss. Code Ann. § 97-3-7(2)(b), defendant was not entitled to have the requested jury instructions on the lesser-included offense of manslaughter under Miss. Code Ann. § 97-3-35 because defendant requested a self-defense instruction, while the definition of manslaughter required that it was not in necessary self-defense, and there was no evidentiary basis of provocation of a degree to evoke an uncontrolled response of anger, rage, hatred, furious resentment or terror. *McCune v. State*, 989 So. 2d 310 (Miss. 2008).

10. — Warrantableness of manslaughter instructions.

Conviction for depraved-heart murder was supported by the evidence. Defendant was not acting in the heat of passion, and thus, a manslaughter conviction was not warranted by the evidence, as defendant’s own testimony showed that he was not provoked by the victim; he argued merely that he had no part in the victim’s murder.

Leggett v. State, 54 So. 3d 317 (Miss. Ct. App. 2011).

Defendant's convictions for two counts of murder were proper because the evidence was consistent with the State's theory that defendant shot the victims while they slept. Therefore, the facts did not warrant a manslaughter instruction under Miss. Code Ann. § 97-3-35. Neese v. State, 993 So. 2d 837 (Miss. Ct. App. 2008).

In a murder case, a heat of passion manslaughter instruction under Miss. Code Ann. § 97-3-35 was not warranted where a verbal argument and physical confrontation did not rise to the requisite level, defendant was not in a state of violent or uncontrollable rage when she shot into an occupied vehicle, and she denied shooting the victim. Cooper v. State, 977 So. 2d 1220 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 1144, 2008 Miss. LEXIS 141 (Miss. 2008).

There was no evidentiary basis for a manslaughter instruction in the record where the arguments of counsel as to what defendant may or may not have felt at the time were irrelevant; there was nothing to indicate that defendant was frightened or that he acted in the heat of passion when he shot and killed the victim, and defendant's own statements to police indicated that he did not act in the heat of passion but rather acted deliberately in shooting the victim. Fair v. State, 976 So. 2d 932 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 343, 2008 Miss. LEXIS 90 (Miss. 2008).

Defendant's murder conviction was upheld because the trial court did not err in rejecting defendant's requested manslaughter instruction, as nothing in defendant's testimony or the testimony of the other witnesses supported an instruction that defendant killed the victim in the heat of passion or in self-defense, and the record was devoid of any evidence indicating that the relationship between defendant and the victim was contentious. Cotton v. State, 933 So. 2d 1048 (Miss. Ct. App. 2006).

11. — — Where evidence justifies murder conviction.

Where the evidence showed that defendant had conducted his own investigation

to find out who was having sexual relations with his wife, after identifying the victim as the one having the affair, proceeded to the victim's house armed with a gun, phoned his attorney and informed him of his intention to kill someone, and shot the unarmed victim, there was abundant evidence that the killing at issue was done with deliberate design so as to support a murder conviction, and the circuit court did not err in refusing defendant's manslaughter instruction. Shorter v. State, 33 So. 3d 512 (Miss. Ct. App. 2009).

Court rejected as without merit defendant's claim that the trial court erred in failing to grant his motion for a judgment notwithstanding the verdict, given that the jury was instructed to consider whether the victim's killing was murder, manslaughter, or committed in self-defense and the jury had sufficient evidence to convict defendant of murder; although defendant argued that the facts supported either excusable or justifiable homicide, the facts were conflicting and created a jury question, as testimony and physical evidence contradicted defendant's testimony that the victim backed him up steps and defendant having left the scene immediately after the stabbing created the impression that he knew the victim was no longer a threat. Ray v. State, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Where a witness testified that he did not see the victim make any threatening movements before defendant drew his pistol and shot the victim, defendant was convicted of murder. The trial court did not err by denying defendant's proposed instructions on heat-of-passion manslaughter under Miss. Code Ann. § 97-3-35; although the words "heat of passion" were not included in the jury instructions, the jury had the option of finding defendant guilty of manslaughter. Smith v. State, 20 So. 3d 12 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 520 (Miss. 2009).

Trial court did not err by refusing to instruct the jury on heat-of-passion manslaughter because: (1) the record indicated that at most, defendant and the victim were engaged in a verbal argument and

perhaps some minor physical altercation; (2) words alone were not enough to require a heat-of-passion instruction; (3) pushing or shoving was also insufficient to require the instruction absent testimony that defendant was acting out of “violent or uncontrollable rage”; (4) the record was void of any evidence that defendant was in a state of violent or uncontrollable rage, since by defendant’s own testimony, he was so drunk that he did not even remember killing the victim; and (5) it is apparent that defendant’s actions were calculated and fell more in line with deliberate-design murder. *Burton v. State*, 999 So. 2d 379 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 34 (Miss. 2009).

Where appellant was convicted of capital murder while in the commission of a robbery, it was not error to deny appellant’s requested lesser-included offense jury instruction on manslaughter, because (1) appellant admitted the killing and the robbery so appellant’s intent was irrelevant, and (2) the only evidence to support heat of passion was a single comment by the victim about appellant’s girlfriend. *Fryou v. State*, 987 So. 2d 461 (Miss. Ct. App. 2008).

Although a doctor testified that the victim’s injuries were consistent with passion, there was absolutely no evidence supporting the theory that defendant’s passion was the result of reasonable provocation; also, evidence that the panties in defendant’s pocket might have sparked an angry altercation between the victim and defendant during which he killed her would have required far too much speculation on behalf of the jury to enable a finding of reasonable provocation. Thus, the trial court properly declined to instruct the jury on heat of passion manslaughter under Miss. Code Ann. § 97-3-35. *Staten v. State*, 989 So. 2d 938 (Miss. Ct. App. 2008), writ of certiorari denied by

993 So. 2d 832, 2008 Miss. LEXIS 400 (Miss. 2008).

In a murder case under Miss. Code Ann. § 97-3-19(1)(a), a trial court did not err by refusing to give an instruction on manslaughter despite evidence of abuse, since the evidence did not show that defendant murdered his father in the heat of passion where he had considered killing him; defendant had forged the victim’s name on a life insurance policy, bought a gun, used gloves, and shot the victim eight times. *Clemons v. State*, 952 So. 2d 314 (Miss. Ct. App. 2007).

Trial court properly denied defendant’s proposed heat of passion manslaughter instruction where there was no violent, uncontrollable rage at the time of the incident; three eyewitnesses testified that defendant blocked in a truck belonging to his estranged wife’s boyfriend, walked over to the truck, opened the door, and shot three times. *Livingston v. State*, 943 So. 2d 66 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 708 (Miss. 2006).

13. —Request for instructions.

Defendant’s requested instruction on manslaughter was properly denied in defendant’s trial for capital murder because the evidence did not support a lesser-included instruction. *Husband v. State*, 23 So. 3d 550 (Miss. Ct. App. 2009), writ of certiorari dismissed by 31 So. 3d 1217, 2010 Miss. LEXIS 218 (Miss. 2010).

In a case in which defendant was convicted of murder, the trial court properly refused defendant’s requested jury instructions on manslaughter, as there was insufficient evidence in the record to support the elements of manslaughter. There was no evidence in the record from which the jury could have determined the killing occurred during heat of passion. *Alford v. State*, 5 So. 3d 1138 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 185 (Miss. 2009).

§ 97-3-37. Homicide; killing of an unborn child; “human being” includes unborn child at every stage of gestation from conception until live birth for purposes of offenses of assault and homicide; “unborn child” defined; intentional injury to pregnant woman; penalties; provisions of section not applicable to legal medical procedures, including abortion.

(1) For purposes of the offenses enumerated in this subsection (1), the term “human being” includes an unborn child at every stage of gestation from conception until live birth and the term “unborn child” means a member of the species homo sapiens, at any stage of development, who is carried in the womb:

(a) Section 97-3-7, simple and aggravated assault and domestic violence;

(b) Section 97-3-15, justifiable homicide;

(c) Section 97-3-17, excusable homicide;

(d) Section 97-3-19, murder, capital murder;

(e) Section 97-3-27, homicide while committing a felony;

(f) Section 97-3-29, homicide while committing a misdemeanor;

(g) Section 97-3-33, killing a trespasser unnecessarily;

(h) Section 97-3-35, killing without malice in the heat of passion;

(i) Section 97-3-45, homicide by means of a dangerous animal;

(j) Section 97-3-47, all other homicides;

(k) Section 97-3-61, poisoning with intent to kill or injure.

(2) A person who intentionally injures a pregnant woman is guilty of a crime as follows:

(a) If the conduct results in a miscarriage or stillbirth by that individual, a felony punishable by imprisonment for not more than twenty (20) years or a fine of not more than Seven Thousand Five Hundred Dollars (\$7,500.00), or both.

(b) If the conduct results in serious physical injury to the embryo or fetus, a felony punishable by imprisonment for not more than twenty (20) years or a fine of not more than Five Thousand Dollars (\$5,000.00), or both.

(c) If the conduct results in minor physical injury to the embryo or fetus, a misdemeanor punishable by imprisonment for not more than six (6) months or a fine of not more than One Thousand Dollars (\$1,000.00), or both.

(3) The provisions of this section shall not apply to any legal medical procedure performed by a licensed physician or other licensed medical professional, including legal abortions, when done at the request of a mother of an unborn child or the mother’s legal guardian, or to the lawful dispensing or administration of lawfully prescribed medication.

(4) Nothing contained in this section shall be construed to prohibit prosecution of an offender pursuant to the provisions of any other applicable statute.

SOURCES: Codes, Hutchinson’s 1848, ch. 64, art. 12, Title 3 (8); 1857, ch. 64, art. 172; 1871, § 2635; 1880, § 2883; 1892, § 1156; 1906, § 1234; Hemingway’s

1917, § 964; 1930, § 992; 1942, § 2222; Laws, 2000, ch. 337, § 1; Laws, 2004, ch. 515, § 3; Laws, 2004, ch. 521, § 1; Laws, 2011, ch. 307, § 1, eff from and after July 1, 2011.

Amendment Notes — The 2011 amendment inserted “murder” preceding “capital murder” in (1)(d); substituted “serious physical injury” for “great bodily harm” in (2)(b); in (2)(c), substituted “minor” for “serious or aggravated” and substituted “six (6) months” for “one (1) year”; deleted former (2)(d) which read as follows: “If the conduct results in physical injury to the embryo or fetus, a misdemeanor punishable by imprisonment for not more than ninety (90) days or a fine of not more than Five Hundred Dollars (\$500.00), or both”; and added (4).

§ 97-3-47. Homicide; all other killings.

JUDICIAL DECISIONS

1. In general.
3. Culpable negligence; generally.
5. Negligent operation of vehicle on highway; generally.
6. —Culpable negligence found or supported.
7. —Culpable negligence not found or supported.
10. Burden and degree of proof.
11. Instructions; generally.
12. — Peremptory instructions.
15. Double jeopardy.
16. Evidence sufficient.

1. In general.

Trial court did not err in denying an inmate’s motion for post-conviction relief because the record contained sufficient evidence that the inmate pleaded guilty to culpable-negligence manslaughter, Miss. Code Ann. § 97-3-47, and aggravated assault, Miss. Code Ann. § 97-3-7, with knowledge and understanding of the elements of each crime when the prosecutor’s on-the-record statement reiterated the charging language in the indictment and evinced an accurate showing that the inmate was informed of the essential elements of the crimes; factual bases existed for the pleas because there was substantial evidence that the inmate committed the crimes. and through his plea petitions, the inmate was specifically informed of the statutory maximum and minimum punishment that each crime carried. *Williams v. State*, 31 So. 3d 69 (Miss. Ct. App. 2010).

In a manslaughter case, defendant’s right to a fundamentally fair trial was

denied because the trial court refused to allow the admission of the testimony of two police officers under Miss. R. Evid. 404(a)(2) where there was sufficient testimony to create a jury issue as to whether the victim was the aggressor in the incident that led to his death; the officers’ testimony was relevant to show prior incidents so that the jury could have placed itself in defendant’s shoes at the time of the incident. *Miller v. State*, 956 So. 2d 221 (Miss. 2007).

Appellate court affirmed defendant’s sentence for 15 years after pleading guilty to manslaughter under Miss Code Ann. § 97-3-47 because Miss. Code Ann. § 97-3-25 provided that the sentencing range was two to 20 years. *Henderson v. State*, 929 So. 2d 391 (Miss. Ct. App. 2006).

3. Culpable negligence; generally.

Jury was properly informed on depraved-heart murder and culpable-negligent manslaughter; the court gave depraved-heart murder jury instruction which stated that if the jury found that appellant killed the victim while engaged in the commission of an act eminently dangerous to others and evincing a depraved heart, disregarding the value of human life, whether or not he had any intention of actually killing the victim, then the jury should find appellant guilty of murder. Culpable negligence was defined as the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as a result of the willful creation of an unreasonable risk

thereof and it was negligence of a degree so gross as to be tantamount to a wanton disregard of or utter indifference to the safety of human life; accordingly, the jury instructions given fully explained the difference between depraved-heart murder and culpable-negligence manslaughter. *Westbrook v. State*, 29 So. 3d 828 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 29 So. 3d 774, 2010 Miss. LEXIS 124 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 98, 178 L. Ed. 2d 62, 2010 U.S. LEXIS 5934, 79 U.S.L.W. 3197 (U.S. 2010).

5. Negligent operation of vehicle on highway; generally.

6. —Culpable negligence found or supported.

Although the testimony showed that there were two guns fired, a .45 caliber pistol and a 9 millimeter pistol, the evidence was sufficient to convict defendant of manslaughter by culpable negligence because, in firing his 9 millimeter pistol, which he admitted to firing, across a crowded parking lot, the jury could have found that defendant possessed the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as the result of the willful creation of an unreasonable risk required to convict him of manslaughter by culpable negligence. *Gary v. State*, 11 So. 3d 769 (Miss. Ct. App. 2009).

7. —Culpable negligence not found or supported.

Evidence was insufficient to sustain defendant's conviction of culpable negligence manslaughter because there was no evidence presented at trial that defendant was speeding or driving recklessly and there was no evidence presented to establish that defendant had been driving while impaired or that defendant had been drinking on the day of the crash. All the evidence showed was that defendant, who may have had a cooler of beer and two open beers in his vehicle, lost control of his vehicle while negotiating a curve and crossed into the victim's lane, thereby causing her death; as such, the State failed to show that defendant's actions rose to the level of wanton or reckless

conduct or that defendant was negligence to such a degree that he was totally indifferent to the safety of human life. *Tate v. State*, 16 So. 3d 699 (Miss. Ct. App. 2008), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 411 (Miss. 2009).

10. Burden and degree of proof.

Defendant's conviction for manslaughter by culpable negligence in violation of Miss. Code Ann. § 97-3-47 was proper because, although defendant had testified that he struck the victim only in self-defense, the overwhelming weight of the evidence suggested otherwise, including the fact that the victim was beaten well after any possible initial threat had passed. *Shirley v. State*, 942 So. 2d 322 (Miss. Ct. App. 2006).

Defendant's guilty plea to manslaughter and robbery was voluntary because he was informed of the elements of both offenses, the trial court assured itself that the elements had been explained prior to accepting defendant's guilty plea, and the specific elements appeared on several documents that defendant signed. *Neal v. State*, 936 So. 2d 463 (Miss. Ct. App. 2006).

11. Instructions; generally.

In a culpable-negligence manslaughter case, where evidence of the defendant's intoxication was presented to prove culpability, the trial court erred by denying defendant's requested jury instruction stating that the operation of a motor vehicle while under the influence of intoxicants could be a factor indicating criminally culpable negligence if the influence of intoxicants proximately contributed to the negligence of the defendant. *Hudson v. State*, 45 So. 3d 1193 (Miss. Ct. App. 2009), writ of certiorari dismissed by 2010 Miss. LEXIS 550 (Miss. Oct. 21, 2010).

In a murder case, there was no error in refusing to instruct the jury on manslaughter where defendant was not claiming self-defense at trial, but alleged that someone else committed the crime. *Green v. State*, 982 So. 2d 471 (Miss. Ct. App. 2008).

Where defendant was charged with murdering her ex-boyfriend, the jury was properly instructed regarding manslaughter by culpable negligence under Miss.

Code Ann. § 97-3-47. Based on defendant's written confession that she went to the victim's house to discuss their relationship, brought a pistol with her, had an argument with the victim, the gun accidentally discharged, and she attempted set fire to his truck, the evidence was legally sufficient to support the jury verdict convicting defendant of murder and not manslaughter. *Brown v. State*, 981 So. 2d 1007 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 222 (Miss. 2008).

In a murder case, defendant's right to a fair trial was not violated when the jury was not instructed on manslaughter under Miss. Code Ann. § 97-3-47 because there was nothing to support a claim that a shooting was accidental where defendant pointed a gun at the victim and shot her from four feet away; moreover, the evidence indicated that defendant acted with malice where defendant and the victim were arguing so much that the victim's daughter was praying for her life prior to the shooting. *Page v. State*, 989 So. 2d 887 (Miss. Ct. App. 2007), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 439 (Miss. 2008).

In a murder case, the facts did not support a culpable negligence manslaughter instruction because: (1) although defendant stated he was scared of victim, he followed victim into the woods; (2) defendant's revolver was fired three times; (3) firing the revolver three times was unlikely to be an accident because the gun's trigger actually had to be pulled three times; and (4) witnesses stated that they

did not see a struggle for the gun and that defendant pointed the gun at the victim and shot him. *Chandler v. State*, 946 So. 2d 355 (Miss. 2006).

12. — Peremptory instructions.

Defendant was not entitled to a peremptory instruction under *Weathersby v. State*, 165 Miss. 207, 209, 147 So. 481, 482 (1933), in a manslaughter case where the physical and testimonial evidence contradicted defendant's statement that a victim was shot at close range. *Speagle v. State*, 956 So. 2d 237 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 296 (Miss. 2007).

15. Double jeopardy.

Defendant's protection against double jeopardy was not violated where he was convicted of both manslaughter and robbery because Miss. Code Ann. § 97-3-47 did not contain as an element that the killing occurred during the commission of some other crime. *Neal v. State*, 936 So. 2d 463 (Miss. Ct. App. 2006).

16. Evidence sufficient.

Where an eyewitness stated that defendant stabbed a victim, a murder weapon was found, and a doctor who performed the autopsy stated that it would have been nearly impossible for the victim to have inflicted such a wound upon herself, there was sufficient evidence to support a manslaughter conviction under Miss. Code Ann. §§ 97-3-35, 97-3-47. There was no need to give a circumstantial evidence instruction based on the direct testimony of the eyewitness. *Brown v. State*, 970 So. 2d 1300 (Miss. Ct. App. 2007).

§ 97-3-49. Suicide; aiding.

Cross References — Imposition and collection of separate laboratory analysis fee in addition to any other assessments and costs imposed by statute on every individual convicted of a felony in a case where Crime Laboratory provided forensic science or laboratory services in connection with the case, see § 45-1-29.

JUDICIAL DECISIONS

2. Assisted-suicide instruction not warranted.

Defendant's conviction for murder in violation of Miss. Code Ann. § 97-3-19(1)(a) was proper because there was no

evidence that warranted an assisted-suicide instruction. Defendant did not claim to have advised, encouraged, abetted, or assisted the victim to take or in the taking of her life; at most, defendant's statement

revealed that the two talked about committing suicide together. Williams v. State, 53 So. 3d 761 (Miss. Ct. App. 2009), reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

§ 97-3-52. Prohibition against selling, buying, offering to sell and offering to buy child or unborn child; penalties.

(1) Selling, buying, offering to sell and offering to buy a child or an unborn child is prohibited and, upon conviction, shall be punishable by a fine not to exceed Twenty Thousand Dollars (\$20,000.00), imprisonment in the custody of the Department of Corrections for a term not to exceed ten (10) years, or both.

(2) This section shall not be construed so as to prohibit any payment to an entity licensed for child placing or as otherwise authorized under Section 43-15-117.

SOURCES: Laws, 2009, ch. 450, § 13, eff from and after July 1, 2009.

§ 97-3-53. Kidnapping; punishment.

Any person who, without lawful authority and with or without intent to secretly confine, shall forcibly seize and confine any other person, or shall inveigle or kidnap any other person with intent to cause such person to be confined or imprisoned against his or her will, or without lawful authority shall forcibly seize, inveigle or kidnap any vulnerable person as defined in Section 43-47-5 or any child under the age of sixteen (16) years against the will of the parents or guardian or person having the lawful custody of the child, upon conviction, shall be imprisoned for life in the custody of the Department of Corrections if the punishment is so fixed by the jury in its verdict. If the jury fails to agree on fixing the penalty at imprisonment for life, the court shall fix the penalty at not less than one (1) year nor more than thirty (30) years in the custody of the Department of Corrections.

This section shall not be held to repeal, modify or amend any other criminal statute of this state.

SOURCES: Codes, 1942, § 2238; Laws, 1932, ch. 301; Laws, 1974, ch. 576, § 3; Laws, 2004, ch. 365, § 1; Laws, 2011, ch. 341, § 1, eff from and after July 1, 2011.

Amendment Notes — The 2011 amendment inserted “any vulnerable person as defined in Section 43-47-5 or” preceding “any child under the age of sixteen (16) years against the will of the parents” in the first sentence of the first paragraph.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1. In general.
2. Elements of offense.
3. Evidence.
4. Double jeopardy.

5. Sentencing; generally.
7. Defenses.

II. UNDER FORMER § 97-3-51.

16. In general.

I. UNDER CURRENT LAW.

1. In general.

There was sufficient evidence for the jury to convict defendant of capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e) and kidnapping in violation of Miss. Code Ann. § 97-3-53 because the jury heard defendant's confession of putting the victim in a headlock and choking him, and the trial court noted that defendant's statement to the police placed him at the scene of the crime and also placed him at the victim's car while the victim was being transported; the verdict was not contrary to the overwhelming weight of the evidence because defendant confessed to choking the victim and helping his co-defendant secure a plastic bag over the victim's head. *McBeath v. State*, 66 So. 3d 663 (Miss. Ct. App. 2010), writ of certiorari denied by 69 So. 3d 9, 2011 Miss. LEXIS 373 (Miss. 2011).

Under Mississippi law, domestic violence, as defined in Miss. Code Ann. § 97-3-7(3), is not a lesser-included offense of kidnapping, a violation of Miss. Code Ann. § 97-3-53, because the two are independent crimes with distinct elements; the elements of domestic violence are not among the elements of kidnapping. *Busby v. State*, 956 So. 2d 1112 (Miss. Ct. App. 2007).

Defendant was properly convicted of kidnapping a child because the offense was complete, despite the fact that the victim did not take advantage of several opportunities to escape when defendant stopped the vehicle. *Potts v. State*, 955 So. 2d 913 (Miss. Ct. App. 2007).

2. Elements of offense.

Evidence was sufficient to support defendant's conviction for kidnapping, although defendant maintained that he did not intend to kidnap the victim by confining the victim to a small room in a mobile home, because kidnapping was not a specific intent crime. *Hager v. State*, 996 So. 2d 94 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 630 (Miss. 2008).

Amount of force required to overtake another person's will to resist is directly proportional to the development of the other's will; therefore, defendant was

properly convicted of kidnapping a child where he used deceit to lure him into a vehicle because the state proved all of the elements of kidnapping, as required by due process. *Potts v. State*, 955 So. 2d 913 (Miss. Ct. App. 2007).

There was sufficient evidence for a rational juror to find that the state proved beyond a reasonable doubt that defendant kidnapped his estranged wife where the wife testified that she was forcibly seized, confined, and held against her will. *Livingston v. State*, 943 So. 2d 66 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 708 (Miss. 2006).

3. Evidence.

Trial judge's decision that a photograph's content was not too remote in time to be relevant and that the danger of unfair prejudice did not substantially outweigh that probative value was not an abuse of discretion because it was within the trial judge's discretion to determine that the photograph of handcuffs in defendant's car was relevant, even though it was taken more than two months after the alleged attempted kidnapping; the presence of the handcuffs in defendant's car was offered to show that on his trips to "look for women," defendant was not looking for consensual relationships, and the presence of handcuffs made it more probable that defendant grabbed the victim with the intent to kidnap her. *Tucker v. State*, 64 So. 3d 594 (Miss. Ct. App. 2011).

Trial court did not err in denying defendant's motion for a new trial because the verdict finding him guilty of armed robbery, kidnapping, and felon in possession of a weapon was not against the overwhelming weight of the evidence when the victim consistently identified defendant as her attacker. *Williams v. State*, 40 So. 3d 630 (Miss. Ct. App. 2010).

Defendant confessed to police that he choked the victim, duct taped a plastic bag around his head to suffocate the victim, placed the victim's body in the trunk of his car, and dumped the body in the woods; the evidence was sufficient to support defendant's conviction for kidnapping pursuant to Miss. Code Ann. § 97-3-53. The Supreme Court of Mississippi held that the trial court did not err by denying

defendant's motion for a directed verdict. *Nelson v. State*, 10 So. 3d 898 (Miss. 2009).

Trial court did not err in denying defendant's motion for a new trial because the evidence supported defendant's convictions for touching a child for lustful purposes and kidnapping; the victim testified as to what transpired and identified both defendant and defendant's vehicle. *Nix v. State*, 8 So. 3d 141 (Miss. 2009).

Evidence as sufficient to support defendant's convictions of burglary, kidnapping, and sexual battery where the father of the two-year-old victim testified that he went to pick up his girlfriend from work and left his children secured in their home, that he encountered the 17-year-old defendant while en route and told him where he was going, that he discovered upon his return that his home had been broken into and that his daughter was missing, that he found defendant with his daughter in an abandoned structure nearby, and that, upon examination, the girl's genital area was red, bleeding, and scratched and where a physician who examined the victim testified that the girl's vagina was red, swollen, and irritated but that there was no evidence of infection as the cause. Because the two-year-old victim was too short to have unlocked the door to the family home by herself and had never walked out of the home unassisted, the evidence permitted the jury to reasonably infer that defendant had broken into the family residence, removed the victim therefrom without her father's permission, and sexually assaulted her. *Moton v. State*, 999 So. 2d 1287 (Miss. Ct. App. 2009).

When the victim went to the post office at night to check her mail, a man placed a gun to her back, told her he needed money, drove to an ATM, withdrew money from her account, and then raped her; the victim identified defendant's voice as belonging to her assailant and she was absolutely certain that he was the man who attacked her. Defendant's fingerprints were found at the crime scene, he did not testify at trial, and the only defense witness did not provide a conclusive alibi; the evidence was sufficient to sustain defendant's conviction for kidnapping, rape,

and armed robbery. *Burton v. State*, 970 So. 2d 229 (Miss. Ct. App. 2007).

Trial court did not err by denying defendant's motions for judgment notwithstanding the verdict and for a new trial after he was convicted of rape, kidnapping, and armed robbery because the evidence, viewed in the light most favorable to the prosecution, showed that: (1) defendant bound the victim and forcibly raped her, threatening her with a knife; (2) DNA testing from the rape kit showed the presence of semen but no sperm in the victim's vagina, consistent with a male donor not reaching ejaculation; (3) defendant forced the victim into her car; and (4) defendant forced the victim to make an ATM withdrawal and give him the cash. *Taggart v. State*, 957 So. 2d 981 (Miss. 2007).

Defendant, who was convicted of kidnapping, a violation of Miss. Code Ann. § 97-3-53, was not entitled to a jury instruction on domestic violence under Miss. Code Ann. § 97-3-7(3) as a lesser included offense because the two were independent crimes with distinct elements. *Busby v. State*, 956 So. 2d 1112 (Miss. Ct. App. 2007).

4. Double jeopardy.

Double jeopardy did not bar defendant's prosecution for murder, Miss. Code Ann. § 97-3-19(2)(e), and kidnapping, Miss. Code Ann. § 97-3-53, because murder and kidnapping had separate statutory elements, requiring different facts. *McBeath v. State*, 66 So. 3d 663 (Miss. Ct. App. 2010), writ of certiorari denied by 69 So. 3d 9, 2011 Miss. LEXIS 373 (Miss. 2011).

Supreme Court of Mississippi held that defendant's prosecution for both capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e) and kidnapping in violation of Miss. Code Ann. § 97-3-53 did not violate double jeopardy; the crimes of capital murder and kidnapping each require proof of an element not necessary to the other. *Nelson v. State*, 10 So. 3d 898 (Miss. 2009).

5. Sentencing; generally.

Defendant's sentence to thirty years' incarceration, with ten years suspended, for kidnapping was not excessive because the sentence was within statutorily pre-

scribed limits. *Clark v. State*, 54 So. 3d 304 (Miss. Ct. App. 2011).

Trial court's sentence of forty years imprisonment for kidnapping exceeded the statutory maximum because the jury did not impose a life sentence upon defendant; therefore, Miss. Code Ann. § 97-3-53 permitted the trial court to impose a sentence of neither less than one year nor more than thirty years, and defendant had to be resentenced in accordance with § 97-3-53. *McBeath v. State*, 66 So. 3d 663 (Miss. Ct. App. 2010), writ of certiorari denied by 69 So. 3d 9, 2011 Miss. LEXIS 373 (Miss. 2011).

Where defendant kidnapped and murdered a high school student, the judge imposed a forty-year kidnapping sentence based on a mortality table which indicated the expected life span for someone the victim's age. The Supreme Court of Mississippi held that the judge erred by imposing a sentence that exceeded the statutory maximum set forth in Miss. Code Ann. § 97-3-53. *Nelson v. State*, 10 So. 3d 898 (Miss. 2009).

7. Defenses.

In defendant's capital murder case, he was not entitled to an instruction that

duress was a defense to the underlying felony of kidnapping because defendant never indicated that the victim had threatened him or had done anything in particular to cause a well-founded fear of death or serious bodily injury. Moreover, on at least two occasions—once at the home and once at the cornfield—defendant actually possessed the gun; additionally, defendant could have attempted to renounce any further participation in the crime, and joined the other occupants at the back of the home. *Ruffin v. State*, 992 So. 2d 1165 (Miss. 2008).

II. UNDER FORMER § 97-3-51.

16. In general.

Defendant's convictions for three counts of manslaughter for his actions in 1964 were appropriate under former Miss. Code Ann. § 2238 (1942) because the record was replete with evidence that there was a kidnapping and because there was no statute of limitations on manslaughter in Mississippi. *Killen v. State*, 958 So. 2d 172 (Miss. 2007).

§ 97-3-54.1. Anti-Human Trafficking Act; prohibited conduct; penalty.

Cross References — Mandatory reporting of offense under subsection (1)(c) of this section relating to procuring sexual servitude of minor when committed by an adult against a minor under the age of sixteen, see § 97-5-51.

§ 97-3-54.4. Anti-Human Trafficking Act; definitions.

For the purposes of Sections 97-3-54 through 97-3-54.4, the following words and phrases shall have the meanings ascribed herein unless the context clearly requires otherwise:

(a) "Actor" means a person who violates any of the provisions of Sections 97-3-54 through 97-3-54.4.

(b) "Blackmail" means obtaining property or things of value of another by threatening to (i) inflict bodily injury on anyone; (ii) commit any other criminal offense; or (iii) expose any secret tending to subject any person to hatred, contempt or ridicule.

(c) "Commercial sexual activity" means any sex act on account of which anything of value is given to, promised to, or received by any person.

(d) “Financial harm” includes, but is not limited to, extortion as defined by Section 97-3-82, Mississippi Code of 1972, or violation of the usury law as defined by Title 75, Chapter 17, Mississippi Code of 1972.

(e) “Forced labor or services” means labor or services that are performed or provided by another person and are obtained or maintained through an actor:

(i) Causing or threatening to cause serious harm to any person;

(ii) Physically restraining or threatening to physically restrain any person;

(iii) Abusing or threatening to abuse the law or legal process;

(iv) Knowingly destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person;

(v) Using blackmail;

(vi) Causing or threatening to cause financial harm to any person; or

(vii) Using any scheme, plan or pattern intended to cause any person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.

(f) “Labor” means work of economic or financial value.

(g) “Maintain” means, in relation to labor or services, to secure continued performance thereof, regardless of any initial agreement on the part of the trafficked person to perform such labor or service.

(h) “Minor” means a person under the age of eighteen (18) years.

(i) “Obtain” means, in relation to labor or services, to secure performance thereof.

(j) “Services” means an ongoing relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor or a third party. Commercial sexual activity and sexually-explicit performances shall be considered services under Sections 97-3-54 through 97-3-54.4.

(k) “Sexually-explicit performance” means a live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.

(l) “Trafficked person” means a person subjected to the practices prohibited by Sections 97-3-54 through 97-3-54.4 and is a term used interchangeably with the terms “victim of trafficking” and “trafficking victim.”

(m) “Venture” means any group of two (2) or more individuals associated in fact, whether or not a legal entity.

(n) “Sexually oriented material” shall have the meaning ascribed in Section 97-5-27, Mississippi Code of 1972.

SOURCES: Laws, 2006, ch. 583, § 6, eff from and after July 1, 2006.

§ 97-3-65. Statutory rape; enhanced penalty for forcible sexual intercourse or statutory rape by administering certain substances.

(1) The crime of statutory rape is committed when:

(a) Any person seventeen (17) years of age or older has sexual intercourse with a child who:

- (i) Is at least fourteen (14) but under sixteen (16) years of age;
- (ii) Is thirty-six (36) or more months younger than the person; and
- (iii) Is not the person's spouse; or

(b) A person of any age has sexual intercourse with a child who:

- (i) Is under the age of fourteen (14) years;
- (ii) Is twenty-four (24) or more months younger than the person; and
- (iii) Is not the person's spouse.

(2) Neither the victim's consent nor the victim's lack of chastity is a defense to a charge of statutory rape.

(3) Upon conviction for statutory rape, the defendant shall be sentenced as follows:

(a) If eighteen (18) years of age or older, but under twenty-one (21) years of age, and convicted under subsection (1)(a) of this section, to imprisonment for not more than five (5) years in the State Penitentiary or a fine of not more than Five Thousand Dollars (\$5,000.00), or both;

(b) If twenty-one (21) years of age or older and convicted under subsection (1)(a) of this section, to imprisonment of not more than thirty (30) years in the State Penitentiary or a fine of not more than Ten Thousand Dollars (\$10,000.00), or both, for the first offense, and not more than forty (40) years in the State Penitentiary for each subsequent offense;

(c) If eighteen (18) years of age or older and convicted under subsection (1)(b) of this section, to imprisonment for life in the State Penitentiary or such lesser term of imprisonment as the court may determine, but not less than twenty (20) years;

(d) If thirteen (13) years of age or older but under eighteen (18) years of age and convicted under subsection (1)(a) or (1)(b) of this section, such imprisonment, fine or other sentence as the court, in its discretion, may determine.

(4)(a) Every person who shall have forcible sexual intercourse with any person, or who shall have sexual intercourse not constituting forcible sexual intercourse or statutory rape with any person without that person's consent by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment, the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.

(b) This subsection (4) shall apply whether the perpetrator is married to the victim or not.

(5) In all cases where a victim is under the age of sixteen (16) years, it shall not be necessary to prove penetration where it is shown the genitals, anus or perineum of the child have been lacerated or torn in the attempt to have sexual intercourse with the child.

(6) For the purposes of this section, “sexual intercourse” shall mean a joining of the sexual organs of a male and female human being in which the penis of the male is inserted into the vagina of the female or the penetration of the sexual organs of a male or female human being in which the penis or an object is inserted into the genitals, anus or perineum of a male or female.

SOURCES: Codes, Hutchinson’s 1848, ch. 64, art. 12, Title 3 (22); 1857, ch. 64, art. 218; 1871, § 2672; 1880, § 2942; 1892, § 1281; 1906, § 1358; Hemingway’s 1917, § 1092; 1930, § 1122; 1942, § 2358; Laws, 1908, ch. 171; Laws, 1974, ch. 576, § 8; Laws, 1977, ch. 458, § 7; Laws, 1985, ch. 389, § 3; Laws, 1993, ch. 497, § 1; Laws, 1998, ch. 549, § 2; Laws, 2007, ch. 335, § 1, eff from and after passage (approved Mar. 14, 2007.)

Amendment Notes — The 2007 amendment added “or the penetration of the sexual organs of a male or female human being in which the penis or an object is inserted into the genitals, anus or perineum of a male or female” to the end of (6); and made a minor stylistic change.

Cross References — Mandatory reporting of offense under this section relating to rape when committed by an adult against a minor under the age of sixteen, see § 97-5-51.

JUDICIAL DECISIONS

I. IN GENERAL.

1. In general.
2. Elements of offense.
3. Consent.
4. Constitutionality.
5. Indictment.
6. Sentence.
8. Instructions.
- 9.5. Effective assistance of counsel.

II. EVIDENTIARY MATTERS.

10. In general.
15. Victims statement to third party.
17. Confession of accused.
19. Sufficiency of evidence; generally.
20. —Corroborating evidence.

I. IN GENERAL.

1. In general.

Miss. Code Ann. § 97-3-65(3)(a), at the time defendant was indicted, was the code section for rape, not statutory rape which was Miss. Code Ann. § 97-3-65(2)(a), and it was not until defendant was sentenced

that the section numbers changed; the indictment was correct and made the nature and cause of the charges against him clear as required. *Davis v. State*, 29 So. 3d 788 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 29 So. 3d 774, 2010 Miss. LEXIS 137 (Miss. 2010).

Pursuant to Miss. Code Ann. § 13-5-73, jurors in a capital case should be sworn to well and truly try the issue between the state and the prisoner, and a true verdict should be given according to the evidence and law, and because the crime of forcible rape was a capital crime under Miss. Code Ann. § 97-3-65(4)(a), defendant was entitled to have the capital oath administered to the jurors, but the trial judge failed to administer that oath; however, the capital oath given in the middle of the trial, together with the petit oath given at the beginning of defendant’s trial, which were substantially the same, were sufficient to instruct the jury of their duty. *Golden v. State*, 968 So. 2d 378 (Miss. 2007), writ of certiorari dismissed by 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

2. Elements of offense.

Victim's testimony established the element of penetration to support defendant's conviction for statutory rape, and defendant's trial counsel repeatedly used the term "sexual intercourse" as involving penetration. *Hunt v. State*, 81 So. 3d 1141 (Miss. Ct. App. 2011), writ of certiorari denied by 82 So. 3d 620, 2012 Miss. LEXIS 135 (Miss. 2012).

Court properly denied defendant's motion for a directed verdict because the crime of statutory rape did not encompass the crime of gratification of lust. The crime of gratification of lust did not require any proof of sexual intercourse or proof of a laceration/tearing of the child's genitalia, and as such, statutory rape required proof of an additional element not required by gratification of lust. *Branch v. State*, 998 So. 2d 411 (Miss. 2008).

In a statutory rape case under Miss. Code Ann. § 97-3-65(1)(b), where a child victim testified that she was penetrated by defendant's penis during a sexual act, the state established that sexual intercourse occurred; moreover, defendant admitted to having sex with the victim, and medical evidence of penetration was not required. *Roles v. State*, 952 So. 2d 1043 (Miss. Ct. App. 2007).

Defendant challenged the sufficiency of his conviction for statutory rape, contending that the evidence was insufficient to show one element, sexual intercourse; however, the 15-year-old alleged victim testified that defendant penetrated her vagina with his penis, and the victim was not sufficiently discredited to warrant overturning the conviction. *Miley v. State*, 935 So. 2d 998 (Miss. 2006).

3. Consent.

Counsel could not be considered ineffective in failing to interview defendant's aunt regarding a 13-year old rape victim's statement to the aunt that she had consensual sex with defendant in exchange for \$50 because consent was not a defense to rape in any form when the victim was under the age of sixteen. *Ducksworth v. State*, 67 So. 3d 1 (Miss. Ct. App. 2011).

4. Constitutionality.

There was no equal protection violation when appellant received a 15-year sen-

tence for statutory rape; appellant conceded that the statute applied equally to male and female defendants. *McKenzie v. State*, 946 So. 2d 392 (Miss. Ct. App. 2006).

5. Indictment.

In a case in which defendant's second indictment charged that defendant unlawfully engaged in sexual intercourse with a child, who was at least 14 years of age but under 16 years of age at the time of the incident and that charge corresponded with Miss. Code Ann. § 97-3-65(1)(a)(i), but the second indictment listed the charging statute as Miss. Code Ann. § 97-3-65(1)(b)(i), which prohibited the statutory rape of a child under 14 years of age, defendant argued unsuccessfully that the State improperly amended his second indictment by changing the subsection number of the charging statute. The substance of defendant's second indictment clearly charged him with the proper crime and gave him sufficient notice of the charge against him; therefore, the amendment of the indictment was simply one of form and, thus, allowable. *Payton v. State*, 41 So. 3d 713 (Miss. Ct. App. 2009), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 422 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 1482, 179 L. Ed. 2d 318, 2011 U.S. LEXIS 1348, 79 U.S.L.W. 3476 (U.S. 2011).

Defendant's conviction for forcible rape was upheld where the indictment gave a clear and concise statement of the elements of the crime with which defendant was charged; the fact that defendant was indicted for violation of Miss. Code Ann. § 97-3-65(3)(a), which provided the penalty for statutory rape, rather than subsection (4)(a) which listed the elements of forcible rape, was of no consequence. *Robinson v. State*, 966 So. 2d 209 (Miss. Ct. App. 2007), writ of certiorari dismissed by 15 So. 3d 426, 2009 Miss. LEXIS 401 (Miss. 2009).

Defendant was charged with two completed acts of rape under Miss. Code Ann. § 97-3-65(4)(a), and the reference to Miss. Code Ann. § 97-3-71, which dealt with attempted rape, was merely a scrivener's error in the indictment, and any reference to Miss. Code Ann. § 97-3-71 in defen-

dant's indictment was of no moment as the substance of the indictment clearly charged defendant with forcible rape under Miss. Code Ann. § 97-3-65; thus, defendant was not entitled to have the jury fix his sentence upon conviction pursuant to the language of Miss. Code Ann. § 97-3-71, and Miss. Code Ann. § 97-3-65(4)(a) clearly allowed the trial court to fix the penalty in the event that the jury failed to do so. *Golden v. State*, 968 So. 2d 378 (Miss. 2007), writ of certiorari dismissed by 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

Although rape required forcible sexual intercourse, and sexual battery required sexual penetration without consent, the indictment specifically put defendant on notice that he was charged with forcibly inserting his sexual organ inside the victim's rectum; his defense to that charge was not that it happened and was consensual, but that it did not happen, and therefore his defense to the original indictment was equally applicable to amended indictment, which changed a charge from rape to sexual battery. *Goodin v. State*, 977 So. 2d 353 (Miss. Ct. App. 2007), affirmed in part and reversed in part by, remanded by 977 So. 2d 338, 2008 Miss. LEXIS 143 (Miss. 2008).

Indictment clearly stated that defendant was being charged with statutory rape in direct violation of Miss. Code Ann. § 97-3-65(1)(a), and the indictment also clearly stated that defendant had sexual intercourse with the victim through a date after her 14 birthday; thus, the indictment was not fatally flawed because it cited Miss. Code Ann. § 97-3-65(1)(a) and used the language in that statute, not the language in Miss. Code Ann. § 97-3-65(1)(b), which required the victim to be under 14 years of age. *Poynor v. State*, 962 So. 2d 68 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 416 (Miss. 2007).

Defendant's argument that the indictment's citation to Miss. Code Ann. § 97-3-65(3) rather than § 97-3-65(4) did not mandate reversal of his conviction because citation to a specific statute was not required to afford adequate notice to defendant. *Magee v. State*, 966 So. 2d 173 (Miss. Ct. App. 2007), writ of certiorari

denied en banc by 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

Indictment was not so flawed as to warrant reversal because: (1) the indictment clearly stated that defendant was being charged with statutory rape in direct violation of Miss. Code Ann. § 97-3-65(1)(a); and (2) the indictment clearly stated that defendant had sexual intercourse with a victim through December of 2004, which was after her 14th birthday, which constituted the offense of statutory rape under Miss. Code Ann. § 97-3-65(1)(a). *Poynor v. State*, — So. 2d —, 2006 Miss. App. LEXIS 857 (Miss. Ct. App. Nov. 21, 2006), opinion withdrawn by, substituted opinion at 962 So. 2d 68, 2007 Miss. App. LEXIS 292 (Miss. Ct. App. 2007).

6. Sentence.

Defendant's 30-year prison sentence for the statutory rape of his 11-year-old daughter was not disproportionate because under Miss. Code Ann. § 97-3-65(3)(c), the statutory rape of a child by an adult carried with it a maximum penalty of life imprisonment, as well as a minimum sentence of 20 years in prison, irrespective of whether it was one's first offense. *Powell v. State*, 49 So. 3d 166 (Miss. Ct. App. 2010).

Imposition of a 30-year sentence, pursuant to Miss. Code Ann. § 97-3-65(3)(c), after defendant was convicted of statutory rape was not grossly disproportionate, despite the fact it was defendant's first offense, because the sentence was within the statutory limits; the rape victim was defendant's eleven-year-old daughter. *Powell v. State*, — So. 3d —, 2010 Miss. App. LEXIS 314 (Miss. Ct. App. June 22, 2010), opinion withdrawn by, substituted opinion at 49 So. 3d 166, 2010 Miss. App. LEXIS 650 (Miss. Ct. App. 2010).

In a case in which a pro se inmate's post-conviction relief (PCR) petition was barred by the three-year statute of limitations, he argued unsuccessfully that the *Towner* decision was an intervening decision that if applied would cause a different result in his case, more specifically a lesser sentence. Not only was the *Towner* decision limited to the uniqueness of the particular case, but the inmate's sentence of thirty years' imprisonment with ten years suspended was well below the max-

imum sentence of life imprisonment he faced under the statutory rape statute. *Robinson v. State*, 19 So. 3d 140 (Miss. Ct. App. 2009).

Defendant's conviction for capital rape was proper because his indictment was not deficient since, although capital rape was not an element of the crime of which he was charged, that fact was of no consequence since the labeling of each count as "capital rape" was mere surplusage. Additionally, it could hardly have been stated that capital rape was a false statement since defendant's maximum possible punishment for a violation of Miss. Code Ann. § 97-3-65(1)(b) was imprisonment for life. *Gordon v. State*, 977 So. 2d 420 (Miss. Ct. App. 2008).

Sentence of 20 years ordered by the trial court pursuant to Miss. Code Ann. § 97-3-65(3)(c) after appellant pleaded guilty to statutory rape was not only within the term provided for by statute, it was the minimum for which the trial court could have sentenced appellant. *Holmes v. State*, 973 So. 2d 1048 (Miss. Ct. App. 2008).

Defendant's sentences of 30 years and 25 years in prison for his convictions of rape and burglary of a dwelling, to be served consecutively, did not constitute cruel and unusual punishment because the trial court imposed sentences within the statutory limits for the crimes, and a threshold comparison of defendant's sentence with his crimes did not raise an inference of gross disproportionality that would trigger the Solem proportionality analysis. *Magee v. State*, 966 So. 2d 173 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

Youth court lacked jurisdiction over defendant, a minor, because he was charged with statutory rape, Miss. Code Ann. § 97-3-65, which if committed by an adult, carried the possibility of sentencing to life imprisonment; the actual sentence defendant might receive because of his age was irrelevant, and thus the youth court was without jurisdiction to proceed. *In the Interest of D.S.*, 943 So. 2d 1280 (Miss. 2006).

Appellate court affirmed the dismissal of an inmate's petition for post-conviction

relief because, inter alia, the inmate's sentence was not more harsh than others across the state as defendant's sentence of 20 years was the minimum sentence he could receive under Miss. Code Ann. § 97-3-65(3)(c). *Smith v. State*, 935 So. 2d 412 (Miss. Ct. App. 2006).

8. Instructions.

Law was clear that physical resistance was not required for a rape conviction when the victim failed to resist out of reasonable fear of great bodily harm, and thus defendant's requested jury instruction did not give the jury an opportunity to find that the victim failed to resist because of a reasonable apprehension of great bodily harm; on the contrary, defendant's requested jury instruction required the jury to find that the victim used all reasonable available physical resistance on her part to the use of force in order to find defendant guilty of rape, and thus the trial court did not err in refusing to grant a jury instruction that would have incorrectly stated the law. *Goodin v. State*, 977 So. 2d 353 (Miss. Ct. App. 2007), affirmed in part and reversed in part by, remanded by 977 So. 2d 338, 2008 Miss. LEXIS 143 (Miss. 2008).

In a statutory rape case, the trial court did not err in refusing to grant defendant's jury instruction because the indictment, as well as the state's jury instruction, clearly addressed whether defendant had sexual intercourse with the victim through a date after her 14 birthday. *Poynor v. State*, 962 So. 2d 68 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 416 (Miss. 2007).

9.5. Effective assistance of counsel.

Where appellant, a forty-four-year-old male, was caught having sexual intercourse with a fourteen-year-old female, he entered a plea of guilty to statutory rape under Miss. Code Ann. § 97-3-65(1)(b). He was not entitled to post-conviction relief based on his claim of ineffective assistance of counsel; because there was ample evidence to convict him of statutory rape, there was no reasonable probability that the outcome of the case would have been different but for counsel's alleged errors. *Maggitt v. State*, 26 So. 3d 363 (Miss. Ct.

App. 2009), writ of certiorari denied by 24 So. 3d 1038, 2010 Miss. LEXIS 38 (Miss. 2010).

II. EVIDENTIARY MATTERS.

10. In general.

Although defendant alleged that he was not allowed to demonstrate bias or prejudice, the trial court did not abuse its discretion in determining that the mother's motive of money was a collateral matter that would not help the jury decide whether the statutory rape or fondling occurred; thus, pursuant to Miss. R. Evid. 103(a), the trial court did not err in excluding that evidence. *Poynor v. State*, 962 So. 2d 68 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 416 (Miss. 2007).

15. Victims statement to third party.

Trial court did not err in allowing a child rape victim's hearsay statements to be admitted under Miss. R. Evid. 803(25) in defendant's statutory rape trial as the victim was eleven years old when she told her mother and aunt that defendant had been having sexual intercourse with her, the statements were spontaneous and consistently repeated, the victim's mental stated seemed to be one of a person who would not fabricate, the victim seemed to be of the character that would be able to relate things reliably to those she to whom she was speaking, more than one person had heard the statements, her relationships to the witnesses showed reliability, the possibility of a faulty recollection was remote, and the people giving the statements seemed to be credible. *Anderson v. State*, 62 So. 3d 927 (Miss. 2011).

In defendant's trial for statutory rape, the trial court did not abuse its discretion in allowing the victim's hearsay testimony under the "tender years" exception of Miss. R. Evid. 803(25). The trial court weighed its concerns with the victim's credibility against the other circumstances and found substantial indicia of reliability in her hearsay statements, and the reviewing court could not state with a definite and firm conviction that the trial court reached the wrong result pursuant to Miss. R. Evid. 103(a). *Grimes v. State*, 1 So. 3d 951 (Miss. Ct. App. 2009).

17. Confession of accused.

Defendant's mild mental retardation did not render his confession per se involuntary, and the trial court properly found that the confession was voluntary, although the interrogator told defendant that he would receive forgiveness from God according to defendant's own expressed belief that God forgives all, where there was nothing to indicate that defendant did not understand what was going on, that he had a particular susceptibility to religious matters, or that he was overcome due to a lack of mental capacity. The trial court fairly considered defendant's mental deficiency as one factor in the totality of the circumstances. *Harden v. State*, 59 So. 3d 594 (Miss. 2011).

19. Sufficiency of evidence; generally.

Evidence was sufficient to support defendant's rape conviction as the evidence showed that the victim testified that defendant held her down and raped her despite her attempt to resist, that DNA from both the victim and defendant was found on a paper towel near where the rape had occurred, and that the victim testified that she did not report the rape immediately because she was ashamed of what had happened. It was the jury's job to determine the victim's credibility. *Ben v. State*, — So. 2d —, 2011 Miss. App. LEXIS 298 (Miss. Ct. App. May 31, 2011).

Defendant's conviction of statutory rape of a child under 14 years of age was not against the overwhelming weight of the evidence, given that (1) the victim stated consistently that defendant raped her, (2) the fact of her rape, if perhaps not the identity of the perpetrator, was corroborated by compelling medical evidence, including that she had untreated chlamydia, and (3) although the State failed to prove that defendant was infected with chlamydia, the State showed that defendant had taken an antibiotic that was used to treat the disease and defendant might have been infected at the time of the rape but did not know it. *Hodges v. State*, 14 So. 3d 786 (Miss. Ct. App. 2009).

Denial of defendant's motion for a new trial after he was convicted of statutory rape and unlawful touching of a child for lustful purposes, in violation of Miss. Code Ann. §§ 97-3-65(1)(b) and 97-5-23(1), was

appropriate because defendant's argument on appeal raised the same points that were part of his trial defense. Defendant also failed to point to anything in the record negating the State's evidence. *Parramore v. State*, 5 So. 3d 1074 (Miss. 2009).

Taking as true the evidence which supported the verdict, including the statements of the victim, her mother, the Department of Human Services social worker, the doctor who examined the victim, and the nurse who completed the rape kit, the jury's finding that defendant was guilty of the statutory rape of the victim was not so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction unconscionable injustice. *Stevenson v. State*, 13 So. 3d 314 (Miss. Ct. App. 2008), writ of certiorari denied by 14 So. 3d 731, 2009 Miss. LEXIS 360 (Miss. 2009).

Defendant's conviction for capital rape in violation of Miss. Code Ann. § 97-3-65(1)(b) was appropriate because the victim, who was six years old, testified as to the events that occurred; she also tested positive for a sexually transmitted disease. *Gordon v. State*, 977 So. 2d 420 (Miss. Ct. App. 2008).

Evidence was sufficient to sustain a statutory rape conviction because the victim gave detailed testimony about her sexual encounter with defendant, it was undisputed that the victim was present at defendant's home at the time of the incident, and although the victim did not immediately report the incident to the authorities, she did discuss it with a friend in a note written five days after the incident. The victim's denial of the allegations to the defense investigator and statements about her stepmother's threats did not so thoroughly discredit or contradict her testimony that a reasonable jury could not have concluded that she had sex with defendant. *Woods' v. State*, 973 So. 2d 1022 (Miss. Ct. App. 2008).

Defendant's conviction for forcible rape in violation of Miss. Code Ann. § 97-3-65(4)(a) was supported by the evidence where the victim was clear in testifying that the victim had not been sexually involved with defendant, and defendant

failed to offer any evidence to contradict the testimony. *Robinson v. State*, 966 So. 2d 209 (Miss. Ct. App. 2007), writ of certiorari dismissed by 15 So. 3d 426, 2009 Miss. LEXIS 401 (Miss. 2009).

Trial court did not err by denying defendant's motions for judgment notwithstanding the verdict and for a new trial after he was convicted of rape, kidnapping, and armed robbery because the evidence, viewed in the light most favorable to the prosecution, showed that: (1) defendant bound the victim and forcibly raped her, threatening her with a knife; (2) DNA testing from the rape kit showed the presence of semen but no sperm in the victim's vagina, consistent with a male donor not reaching ejaculation; (3) defendant forced the victim into her car; and (4) defendant forced the victim to make an ATM withdrawal and give him the cash. *Taggart v. State*, 957 So. 2d 981 (Miss. 2007).

Evidence was sufficient to convict defendant of rape as: (1) the victim testified that defendant was between her legs and inside of her; (2) she was unable to get away from defendant when he was on top of her; (3) defendant would not stop when she told him to; (4) although defendant did not beat her during the attacks, she testified that he forced her to take her clothes off; (5) she did not scream because she was scared; and (6) two witnesses testified that defendant "messed with" the victim. *Goodin v. State*, 977 So. 2d 353 (Miss. Ct. App. 2007), affirmed in part and reversed in part by, remanded by 977 So. 2d 338, 2008 Miss. LEXIS 143 (Miss. 2008).

In a statutory rape case under Miss. Code Ann. § 97-3-65(1)(b), a motion for a new trial was properly denied because the guilty verdict was not against the overwhelming weight of the evidence; the victim testified regarding penetration by defendant's penis, defendant admitted to having sex with the victim, and the victim's story was corroborated by her friends, and defendant's denials at trial were the only evidence supporting his claim that the two did not have sex. *Roles v. State*, 952 So. 2d 1043 (Miss. Ct. App. 2007).

Jury's verdict finding defendant guilty of statutory rape was not against the overwhelming weight of the evidence and

the evidence was sufficient to convict defendant of statutory rape because, inter alia: (1) the victim testified that she was younger than 14 when defendant had sex with her on several occasions; (2) defendant was 44 years old when the rapes occurred and the victim was 12 so there was more than 24 months age difference between the victim and defendant; and (3) the victim's mother testified that she saw defendant have sex with the victim several times; thus, the trial court did not abuse its discretion when it overruled defendant's motion for a new trial or for a judgment notwithstanding the verdict. *Terrell v. State*, 952 So. 2d 998 (Miss. Ct. App. 2006).

20. —Corroborating evidence.

Defendant's conviction for the statutory rape of his 11-year-old daughter was supported by the evidence because his daughter's testimony that he raped her was corroborated by the medical evidence; although defendant testified that he had never been infected with trichomoniasis, that statement was contradicted by his prior admission to the police that he had, in fact, contracted the disease. *Powell v. State*, 49 So. 3d 166 (Miss. Ct. App. 2010).

Jury's verdict convicting defendant of statutory rape was not so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. While defendant raised some legitimate concerns about the victim's credibility, her testimony was cor-

roborated by a friend's testimony and compelling medical evidence. *Grimes v. State*, 1 So. 3d 951 (Miss. Ct. App. 2009).

In a statutory rape case under Miss. Code Ann. § 97-3-65(1)(b), a motion for a directed verdict was properly denied because the evidence was sufficient to support the conviction based on the testimony of the victim, her friends, and several officers; defendant admitted to having sex with the victim during a police interview, the victim stated that defendant penetrated her with his penis, and the victim's friends saw her leave with defendant on the date of the alleged incident. *Roles v. State*, 952 So. 2d 1043 (Miss. Ct. App. 2007).

There was sufficient evidence to support defendant's conviction of forcible rape because: (1) the victim testified that the sex was forcible, not consensual; (2) the victim called the police immediately after defendant's departure; (3) the victim bore injuries consistent with her allegation of having been forcibly attacked; (4) all of the law enforcement officers and hospital personnel involved observed that the victim's injuries were fresh and that she was upset and anxious; and (5) while the physician was unable to discern whether the victim's vaginal injuries were indicative of forcible sexual intercourse, he never testified that her injuries were inconsistent with rape. *Magee v. State*, 966 So. 2d 173 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

ATTORNEY GENERAL OPINIONS

A defendant charged with statutory rape is ineligible for the pretrial intervention program even if the facts do not

involve any use of force or violence. *Brewer*, July 28, 2006, A.G. Op. 06-0289.

RESEARCH REFERENCES

Law Reviews. Comment: Eliminating Injustice: Revising Mississippi's Statutory

Rape Laws, 76 Miss. L.J. 1067, Spring, 2007.

§ 97-3-68. Rape; procedure for introducing evidence of sexual conduct of complaining witness; “complaining witness” defined.

JUDICIAL DECISIONS

2. Sufficiency of evidence.

Defendant's conviction for statutory rape was not contrary to the overwhelming weight of the evidence because defendant was on sufficient notice of the statutory-rape charge, the jury was properly instructed that it had to consider each count separately and that it had to find beyond a reasonable doubt that defendant committed the statutory rape on or about the date charged, and the circuit court granted an alibi-defense instruction, but the jury rejected it, as it was free to do; the victim's testimony that the first sexual encounter occurred on July 30 and that it occurred on the day of a casino trip did not necessarily contradict her testimony that the casino trip took place either July 30 or 31, the circuit court instructed that the State had to prove beyond a reasonable doubt that the offense charged occurred “on or about July 30,” and the victim's

testimony was sufficiently specific to prove that necessary element. *Timmons v. State*, 44 So. 3d 1021 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

When the victim went to the post office at night to check her mail, a man placed a gun to her back, told her he needed money, drove to an ATM, withdrew money from her account, and then raped her; the victim identified defendant's voice as belonging to her assailant and she was absolutely certain that he was the man who attacked her. Defendant's fingerprints were found at the crime scene, he did not testify at trial, and the only defense witness did not provide a conclusive alibi; the evidence was sufficient to sustain defendant's conviction for kidnapping, rape, and armed robbery. *Burton v. State*, 970 So. 2d 229 (Miss. Ct. App. 2007).

§ 97-3-71. Rape; assault with intent to ravish.

Cross References — Mandatory reporting of offense under this section relating to rape and assault with intent to ravish when committed by an adult against a minor under the age of sixteen, see § 97-5-51.

JUDICIAL DECISIONS

2. Indictment.

Defendant was charged with two completed acts of rape under Miss. Code Ann. § 97-3-65(4)(a), and the reference to Miss. Code Ann. § 97-3-71, which dealt with attempted rape, was merely a scrivener's error in the indictment, and any reference to Miss. Code Ann. § 97-3-71 in defendant's indictment was of no moment as the substance of the indictment clearly charged defendant with forcible rape un-

der Miss. Code Ann. § 97-3-65; thus, defendant was not entitled to have the jury fix his sentence upon conviction pursuant to the language of Miss. Code Ann. § 97-3-71, and Miss. Code Ann. § 97-3-65(4)(a) clearly allowed the trial court to fix the penalty in the event that the jury failed to do so. *Golden v. State*, 968 So. 2d 378 (Miss. 2007), writ of certiorari dismissed by 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

§ 97-3-73. Robbery; definition.

JUDICIAL DECISIONS

2. Indictment.
3. Evidence.
4. Instructions.
5. Miscellaneous.
6. Sentence.

2. Indictment.

Because defendant's indictment failed to charge the essential elements of armed robbery, the circuit court lacked subject matter jurisdiction over the offense of armed robbery, but the indictment properly charged defendant with the crime of simple robbery; however, defendant's guilty plea was involuntary because he was not informed of the true nature and consequences of the charge. *Garner v. State*, 944 So. 2d 934 (Miss. Ct. App. 2006), writ of certiorari dismissed by 951 So. 2d 563, 2007 Miss. LEXIS 534 (Miss. 2007).

Because the information did not sufficiently charge defendant with armed robbery, as it did not charge the overt act as the display of a weapon by another perpetrator and then the shooting of the victim, defendant's armed robbery conviction, the result of a guilty plea, was reversed; however, because there was a sufficient charge of simple robbery, if not for the word "attempt," the court affirmed a conviction of robbery, and remanded for sentencing on that count. *Neal v. State*, 936 So. 2d 463 (Miss. Ct. App. 2006).

3. Evidence.

Defendant's conviction for robbery was proper because the sum of \$1,200 was taken from the store and two store clerks testified that defendant demanded that they give him the money several times. Defendant ultimately insisted the money be given to him or the clerks would not live to see another day; both clerks were afraid for their lives due to defendant's threats. *Taylor v. State*, 62 So. 3d 962 (Miss. 2011).

Conviction for robbery under Miss. Code Ann. § 97-3-73 was not against the overwhelming weight of the evidence where the evidence showed that appellant

attacked a victim and took her cell phone; moreover, the jury inferred intent from appellant's actions, and it was the jury's job to determine the credibility of the witnesses. *Armstead v. State*, 80 So. 3d 112 (Miss. Ct. App. 2011), writ of certiorari denied en banc by 80 So. 3d 111, 2012 Miss. LEXIS 77 (Miss. 2012).

Because the victim was aware that defendant was attempting to take the victim's rifle, did not consent to defendant's taking it, and let go of the victim's end of the rifle in fear of being shot, the evidence was sufficient to prove that defendant's taking of the rifle was effectuated through violence, as required by Miss. Code Ann. § 97-3-73. *Davis v. State*, 75 So. 3d 569 (Miss. Ct. App. 2011), writ of certiorari denied by 76 So. 3d 169, 2011 Miss. LEXIS 583 (Miss. 2011).

Defendant's conviction for simple robbery was appropriate because there was testimony that defendant participated in the robbery, that he gave misleading information to a 911 operator about the robber's location, and a sergeant testified that defendant had deliberately blocked the sergeant's pursuit of a codefendant. *Dora v. State*, 61 So. 3d 226 (Miss. Ct. App. 2011).

Defendant's conviction for simple robbery was appropriate because his argument that the charge for armed robbery could not stand because a codefendant did not have a weapon was without merit. During the trial, defendant made a motion for a directed verdict on the basis that the State did not prove that the codefendant had a weapon and the trial court allowed the case to proceed on the lesser-included offense of simple robbery, which was an appropriate action; further, the jury convicted defendant of simple robbery, not armed robbery. *Dora v. State*, 61 So. 3d 226 (Miss. Ct. App. 2011).

Evidence was sufficient to convict defendant of simple robbery because a sandwich shop clerk identified defendant from a photographic lineup, and defendant's wife corroborated the clerk's identification

testimony that defendant had rough-looking hands, a gap in his teeth, and spoke with a stutter. *Sanders v. State*, 32 So. 3d 1214 (Miss. Ct. App. 2009), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 433 (Miss. 2010).

After the victim stated that he wanted to have sex with defendant's sister, defendant became enraged, picked up a lead pipe, walked away from the campsite, told two witnesses that he was going to kill the victim, returned to the campsite ten minutes later, and beat the victim in the head repeatedly with the pipe. Defendant's admission that he took the victim's keys and truck before driving to Alabama to dispose of the body was sufficient to establish the offense of robbery under Miss. Code Ann. § 97-3-73 as the underlying felony in the capital murder case. *Woods v. State*, 14 So. 3d 767 (Miss. Ct. App. 2009).

Defendant's convictions for robbery and capital murder were appropriate because, while the circuit court erred in allowing references to a deceased codefendant's statement to law enforcement to corroborate defendant's statement, the violation of defendant's constitutional right to confront the witness was harmless since the weight of the evidence was overwhelming. Defendant's own statement confessing to robbing the victim and stabbing him in the abdomen with a screwdriver was entered into evidence; other evidence included an officer's and sheriff's recounting of the "treasure hunt" with the codefendant, where they traveled to various areas and retrieved evidence that corroborated defendant's statement to a "T." Singleton *v. State*, 1 So. 3d 930 (Miss. Ct. App. 2008).

Evidence of robbery was sufficient because it established that the defendant grabbed the victim and said, "This is a robbery, give me all your money"; he threatened to shoot her, cut her or hit her over the head with a beer bottle if she tried to get away; the victim identified defendant as her assailant; and the victim's checkbook was recovered from defendant's vehicle pursuant to a search warrant. *Scott v. State*, 981 So. 2d 964 (Miss. 2008).

Defendant's conviction for capital murder while in the commission of a robbery was appropriate because defendant ad-

mitted that he went to an individual's house with the intention of stealing the victim's personal property and further admitted to shooting the victim; he also admitted that the crack cocaine at issue was stolen from the victim. The only dispute was how he came into possession of the crack cocaine and a witness testified that after shooting the victim, defendant rolled the victim over and picked up a pill bottle. *Nelson v. State*, 995 So. 2d 799 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 660 (Miss. 2008).

Defendant's conviction for robbery was appropriate because the evidence indicated that defendant took the money as a quid pro quo to stop beating his father; thus, it was only the threat of a continued beating that caused the father to hand over the money. *Downs v. State*, 962 So. 2d 1255 (Miss. 2007).

Evidence was sufficient to convict defendant of robbery when the gas station clerk identified defendant as the person who came into the station and asked her to hand over the cash in the drawer, and the clerk's testimony was corroborated by an eyewitness who had seen defendant at the gas station before and after the robbery and who was able to identify defendant. *Reed v. State*, 956 So. 2d 1110 (Miss. Ct. App. 2007).

In a case where the identity of two alleged armed robbery victims was not placed into evidence, there was insufficient evidence to support convictions under Miss. Code Ann. § 97-3-73 since identity was an essential element of the crime; although the victims were identified in the indictment, they did not testify at trial, and police did not reveal their identities during examination. *Carter v. State*, 965 So. 2d 705 (Miss. Ct. App. 2007).

In a case where defendant was convicted of capital murder during the commission of a robbery when he killed his father and stole his father's revolver and car, the jury's verdict was not against the overwhelming weight of the evidence because, inter alia: (1) there was testimony that placed defendant at or near the scene of the crime; (2) several area residents testified to hearing loud bangs around the time defendant was at the scene of the

crime, and to hearing a car door slam, tires squeal, and a car speed off from the area moments after hearing the unidentified loud bangs; and (3) there was testimony that the revolver found at the scene of defendant's car accident belonged to his father. *Boone v. State*, 964 So. 2d 512 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 515 (Miss. 2007).

Sufficient evidence existed to convict defendant of Miss. Code Ann. § 97-3-73 as the jury could infer felonious intent from the circumstances surrounding the crime, and the victim's own testimony under direct examination established that defendant used force to take and carry away the victim's property. *Moore v. State*, 942 So. 2d 251 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 757 (Miss. 2006).

Where a bank teller testified that defendant went through the bank line, placed a knife on the counter, and demanded money from two tellers, defendant was indicted for armed robbery in violation of Miss. Code Ann. § 97-3-79; the evidence was sufficient to support the jury's verdict convicting him of the lesser-included offense of robbery under Miss. Code Ann. § 97-3-73, and when police apprehended defendant he had a steak knife on his person. *Wilson v. State*, 935 So. 2d 945 (Miss. 2006), writ of certiorari denied by 549 U.S. 1348, 127 S. Ct. 2047, 167 L. Ed. 2d 780, 2007 U.S. LEXIS 4088, 75 U.S.L.W. 3554 (2007).

4. Instructions.

Three defendants' capital-murder convictions were appropriate because, although a limiting instruction given to the jury regarding confessions by defendants was not sufficient, no prejudice or manifest injustice resulted as to any defendant; each of the defendants gave sufficient evidence of his individual participation in the robbery of a gun store in his separate

statements to support a capital-murder charge. *Anderson v. State*, 5 So. 3d 1088 (Miss. Ct. App. 2007), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 171 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 184 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 177 (Miss. 2009).

5. Miscellaneous.

Defendant's guilty plea to manslaughter and robbery was voluntary because he was informed of the elements of both offenses, the trial court assured itself that the elements had been explained prior to accepting defendant's guilty plea, and the specific elements appeared on several documents that defendant signed. *Neal v. State*, 936 So. 2d 463 (Miss. Ct. App. 2006).

6. Sentence.

In an appeal from a circuit court's summary dismissal of his motion for post-conviction relief pursuant to Miss. Code Ann. § 99-39-11(2), a pro se inmate argued unsuccessfully that his sentence illegally exceeded the statutory maximum under Miss. Code Ann. § 97-3-73, and therefore, it was illegal for the circuit court to institute and then revoke his post-release supervision. Since the inmate's sentence did not exceed the maximum allowable sentence as provided for in Miss. Code Ann. § 97-3-75, there was no merit to his argument that because his sentence exceeded the time allowed by the statute, his post-release supervision was not illegally instituted and revoked, there was no merit to his argument that he should have received credit for the time he spent on post-release supervision, and, under Miss. Code Ann. § 47-7-37, the circuit court had the right to reimpose the previously suspended 12-year sentence. *Fluker v. State*, 2 So. 3d 717 (Miss. Ct. App. 2008).

§ 97-3-75. Robbery; penalty.

JUDICIAL DECISIONS

1. In general.
2. Maximum sentence.

1. In general.

Defendant's 15-year prison sentence for strong arm robbery was not disproportionate to the crime because the sentence was consistent with the State's recommendation, which defendant acknowledged prior to entering a guilty plea; the sentence was also within the statutory limits. *Beamon v. State*, 9 So. 3d 376 (Miss. 2009).

Explanations given to defendant about the nature of the charge, the possible sentences and other consequences of the plea, and the plea bargaining process all pertained to armed robbery, not to simple robbery, and for this reason, defendant's guilty plea was not voluntary in a constitutional sense; nor was defendant accurately informed of the consequences of a guilty plea to robbery where the maximum sentence for armed robbery was life if fixed by the jury, Miss. Code Ann. § 97-3-79, and the maximum sentence for simple robbery was 15 years, Miss. Code Ann. § 97-3-75; when defendant evaluated the state's plea recommendation and made his decision to plead guilty, he was under the erroneous belief that he could be sentenced to life imprisonment were he to proceed to trial and be found guilty, when

in fact he could have received only 15 years. *Garner v. State*, 944 So. 2d 934 (Miss. Ct. App. 2006), writ of certiorari dismissed by 951 So. 2d 563, 2007 Miss. LEXIS 534 (Miss. 2007).

2. Maximum sentence.

In an appeal from a circuit court's summary dismissal of his motion for post-conviction relief pursuant to Miss. Code Ann. § 99-39-11(2), a pro se inmate argued unsuccessfully that his sentence illegally exceeded the statutory maximum under Miss. Code Ann. § 97-3-73, and therefore, it was illegal for the circuit court to institute and then revoke his post-release supervision. Since the inmate's sentence did not exceed the maximum allowable sentence as provided for in Miss. Code Ann. § 97-3-75, there was no merit to his argument that because his sentence exceeded the time allowed by the statute, his post-release supervision was not illegally instituted and revoked, there was no merit to his argument that he should have received credit for the time he spent on post-release supervision, and, under Miss. Code Ann. § 47-7-37, the circuit court had the right to reimpose the previously suspended 12-year sentence. *Fluker v. State*, 2 So. 3d 717 (Miss. Ct. App. 2008).

§ 97-3-77. Robbery; threat to injure person or relative at another time.

JUDICIAL DECISIONS

1. Time to suspend or to amend sentence.
2. Sufficiency of evidence.

1. Time to suspend or to amend sentence.

Defendant did not receive an illegal sentence where defendant failed to report and when defendant then appeared before the court the court imposed a sentence of 20 years for robbery; the 20-year sentence was one that could have been imposed at

the time defendant pled guilty. *Adams v. State*, 954 So. 2d 1051 (Miss. Ct. App. 2007).

2. Sufficiency of evidence.

When the victim went to the post office at night to check her mail, a man placed a gun to her back, told her he needed money, drove to an ATM, withdrew money from her account, and then raped her; the victim identified defendant's voice as belonging to her assailant and she was abso-

lutely certain that he was the man who attacked her. Defendant's fingerprints were found at the crime scene, he did not testify at trial, and the only defense witness did not provide a conclusive alibi; the

evidence was sufficient to sustain defendant's conviction for kidnapping, rape, and armed robbery. *Burton v. State*, 970 So. 2d 229 (Miss. Ct. App. 2007).

§ 97-3-79. Robbery; use of deadly weapon.

JUDICIAL DECISIONS

2. Construction and application; generally.
3. —Elements of robbery.
5. —What constitutes deadly weapon.
7. Indictment.
8. Evidence; generally.
9. —Identification.
10. —Prior to other offenses.
12. Sufficiency of evidence; generally.
13. —Exhibition or use of weapon.
14. Instructions; generally.
16. —Lesser offenses.
18. Conviction of lesser offense.
20. Sentence.
21. Miscellaneous.
22. Double jeopardy.

2. Construction and application; generally.

3. —Elements of robbery.

In a case in which defendant, who had pled guilty to armed robbery, appealed the dismissal of his motion for post-conviction relief, he argued unsuccessfully that the indictment was defective because Count IV did not describe the personal property that was allegedly taken from the victim. Miss. Code Ann. § 97-3-79 did not suggest that a description of the personal property allegedly taken was a necessary element of the crime. *Ewing v. State*, 34 So. 3d 612 (Miss. Ct. App. 2009), writ of certiorari denied by 34 So. 3d 1176, 2010 Miss. LEXIS 245 (Miss. 2010).

Factual basis existed for defendant's guilty pleas where the factual summary expressed by the State, and agreed to by defendant, satisfied all elements of both crimes of manslaughter, Miss. Code Ann. § 97-3-35, and armed robbery, Miss. Code Ann. § 97-3-79; it showed that defendant intended to take the victim's automobile through the exhibition of a deadly weapon and it further demonstrated that defen-

dant did, in fact, take the victim's automobile by shooting the victim and the victim died as a result of his wounds. *Keith v. State*, 999 So. 2d 383 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 52 (Miss. 2009).

5. —What constitutes deadly weapon.

Because inmate was informed by the court, prior to his guilty plea, of all the elements of the crime of robbery with a deadly weapon under § 97-3-79, and that a B.B. gun constituted a "deadly weapon," his claim on appeal that his plea was involuntary and unintelligent was without merit. *Cherry v. State*, 24 So. 3d 1048 (Miss. Ct. App. 2010).

Although a knife was a deadly weapon that qualified to sustain a plea for armed robbery, a judgment was remanded for a correction where it incorrectly showed that an inmate used a firearm instead. *Hinton v. State*, 947 So. 2d 979 (Miss. Ct. App. 2006), writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 94 (Miss. 2007).

7. Indictment.

In a case in which defendant, who pled guilty to armed robbery, appealed the dismissal of his motion for post-conviction relief, he argued unsuccessfully that the indictment was defective because Count IV charged him with attempted armed robbery, not armed robbery. Count IV basically tracked the language of Miss. Code Ann. § 97-3-79, but it included the phrase "attempt to take" instead of using the entire phrase of "take or attempt to take; however, because the act of armed robbery was complete upon the attempt, it was immaterial that the indictment only charged that defendant attempted to take the personal property of the victim. *Ewing v. State*, 34 So. 3d 612 (Miss. Ct. App.

2009), writ of certiorari denied by 34 So. 3d 1176, 2010 Miss. LEXIS 245 (Miss. 2010).

Defendant's indictment included the relevant language from Miss. Code Ann. § 97-3-79 and the evidence clearly showed that the armed robbery crimes were based on the same act or transaction. Thus, there was no defect in the indictment under Miss. Code Ann. § 99-7-2(1). *Thomas v. State*, 14 So. 3d 812 (Miss. Ct. App. 2009).

Indictment sufficiently charged the offense because it charged that defendant and her co-defendants acted with the intent to steal the property of the bank. The indictment also charged that they did so by exhibiting and firing a pistol — acts which put the employees of the bank in fear of immediate injury to their persons. *Glenn v. State*, 996 So. 2d 148 (Miss. Ct. App. 2008).

In an armed robbery case, there was a sufficient factual basis for the plea under Miss. Unif. Cir. & Cty. R. 8.04 based on a specific indictment that alleged that defendant and his associate took property from persons at a bank, and they were in fear of immediate injury due to the exhibition of deadly weapons; after a reading of the indictment during the plea hearing, defendant stated that he committed the crime. *Robinson v. State*, 964 So. 2d 609 (Miss. Ct. App. 2007).

Because defendant's indictment failed to charge the essential elements of armed robbery, the circuit court lacked subject matter jurisdiction over the offense of armed robbery, but the indictment properly charged defendant with the crime of simple robbery; however, defendant's guilty plea was involuntary because he was not informed of the true nature and consequences of the charge. *Garner v. State*, 944 So. 2d 934 (Miss. Ct. App. 2006), writ of certiorari dismissed by 951 So. 2d 563, 2007 Miss. LEXIS 534 (Miss. 2007).

Burglary conviction under Miss. Code Ann. § 97-17-23 was upheld where acquittal on armed robbery charges, brought under Miss. Code Ann. § 97-3-79, did not invoke the doctrine of merger because it was not, as alleged, impossible for defendant to have committed the armed robbery

without first committing the burglary. *Smallwood v. State*, 930 So. 2d 448 (Miss. Ct. App. 2006).

Because the information did not sufficiently charge defendant with armed robbery, as it did not charge the overt act as the display of a weapon by another perpetrator and then the shooting of the victim, defendant's armed robbery conviction, the result of a guilty plea, was reversed; however, because there was a sufficient charge of simple robbery, if not for the word "attempt," the court affirmed a conviction of robbery, and remanded for sentencing on that count. *Neal v. State*, 936 So. 2d 463 (Miss. Ct. App. 2006).

8. Evidence; generally.

Defendant's conviction for armed robbery and the denial of his motion for a new trial were both proper because the appellate court failed to see how the judge's decision to change his mind and sustain the State's objection on a ground not specified by the State had any effect on defendant's trial. Further, the exclusion of the victim's testimony concerning the officer's belief as to the victim's intoxication did not affect any substantial right of defendant, Miss. R. Evid. 103(a)(2). *McClendon v. State*, 17 So. 3d 184 (Miss. Ct. App. 2009).

Trial court did not abuse its discretion in sustaining the hearsay objection as to whether anyone stated that defendant or his accomplice were attempting to steal a car where defendant argued that the testimony would have constituted a hearsay exception as to the declarant's intent, plan, or motive to do something in the future under Miss. R. Evid. 803(3); however, the exclusion of that testimony was not grounds for reversal because it did not affect any of defendant's substantial rights as it was not necessary to his defense. *White v. State*, 969 So. 2d 72 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 658 (Miss. 2007).

9. —Identification.

Evidence was sufficient to support defendant's armed robbery conviction because: (1) the victim made a positive pre-trial identification of defendant when she picked his picture out of a photographic

lineup three days after the robbery occurred; (2) an accomplice positively identified defendant as the perpetrator; (3) the officer told the jury about the search that was conducted at defendant's residence and where and how the gun was found; and (4) the accomplice stated that defendant owned a gun. *Trammell v. State*, 62 So. 3d 424 (Miss. Ct. App. 2011).

Trial court did not err in denying defendant's motion to suppress a robbery victim's pretrial identification of him there was substantial credible evidence supporting the trial court's ruling that there was not a substantial likelihood of irreparable misidentification when a six-pack photographic lineup was not impermissibly suggestive, the victim had ample opportunity to view defendant at the time of the crime, and from her testimony, it was clear that the victim paid a great deal of attention to defendant; throughout the case, including pretrial identification, the victim never wavered in her identification of defendant as her attacker, and she gave a detailed description of defendant, identified him from two photographs without hesitating, and positively identified him during trial more than once. *Williams v. State*, 40 So. 3d 630 (Miss. Ct. App. 2010).

Although a show-up identification was inappropriate where the defendant was already in custody and the eyewitness was not grievously injured nor was there any threat that he was unavailable for a later line-up, the trial court did not err in failing to suppress evidence of the show-up identification where the eyewitness had an excellent opportunity to view the defendant during the robbery and had made the identification within 24 hours of the robbery. *Outerbridge v. State*, 947 So. 2d 279 (Miss. 2006).

10. —Prior to other offenses.

Corroborated testimony indicated that the incident began as a demand by defendant and his accomplice for the victim to give them some money, and the testimony also indicated that when the victim refused to hand over any money, defendant and his accomplice threatened the victim, attacked him with weapons, and left his unconscious body on the street; there was sufficient evidence from which the jury could find the necessary elements of robbery,

and the circuit court did not err in denying defendant's motion for a directed verdict. *Ames v. State*, 17 So. 3d 130 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 433 (Miss. 2009).

12. Sufficiency of evidence; generally.

Defendant's conviction for armed robbery was proper, as an eyewitness identified defendant, clothes matching those worn by a robber on a surveillance video were found at defendant's home, and defendant confessed. *Pinkston v. State*, 50 So. 3d 1027 (Miss. Ct. App. 2010).

Defendant's conviction for robbery by use of a deadly weapon was appropriate because the evidence was sufficient. There were surveillance videos documenting both of defendant's visits to the gas station; the jury heard the codefendants testify that defendant was involved with the planning and execution of the robbery, which included testimony that defendant was the lookout and that he was supposed to wave his hand if it was clear to rob the clerk; and surveillance video showed defendant waving his hand shortly before the clerk was robbed. *Pritchett v. State*, 32 So. 3d 545 (Miss. Ct. App. 2010).

Evidence was sufficient to support defendant's conviction for robbery because defendant pointed a gun at the victim and demanded money, which he ultimately got; the verdict was not against the overwhelming weight of the evidence because the victim consistently identified defendant as her attacker. *Williams v. State*, 40 So. 3d 630 (Miss. Ct. App. 2010).

There was sufficient evidence to convict defendant of three counts of armed robbery. The jury was presented with testimony and evidence that defendant feloniously took money from three victims, against their will, by putting each man in fear of immediate injury by the exhibition of a deadly weapon, i.e., the gun. A rational jury could have found the essential elements of armed robbery beyond a reasonable doubt. *Johnson v. State*, 29 So. 3d 738 (Miss. 2009).

Defendant's convictions for house burglary, aggravated assault, armed robbery, and auto theft were proper because the evidence was sufficient. In part, defendant severely beat the victim, demanded that

she give him her purse, and then took her purse, a gun, and a set of keys to the victim's vehicle. The victim later identified defendant, based upon her own independent recollection, in a photographic lineup. *Brunner v. State*, 37 So. 3d 645 (Miss. Ct. App. 2009), writ of certiorari denied by 36 So. 3d 455, 2010 Miss. LEXIS 323 (Miss. 2010).

Evidence, including photographic procedure used to identify defendant and testimony of two victims that they were placed in fear of immediate injury as a gun was pointed at each of them in order to induce them to hand over money from each of their case registers, was sufficient to convict defendant of two counts of armed robbery in violation of Miss. Code Ann. § 97-3-79. *Conner v. State*, 26 So. 3d 383 (Miss. Ct. App. 2009), writ of certiorari denied by 24 So. 3d 1038, 2010 Miss. LEXIS 36 (Miss. 2010).

In defendant's trial on a charge of capital murder, the court rejected defendant's claim that the prosecution failed to produce evidence sufficient to convict him of the underlying felony of robbery because defendant's possession of the deceased victim's wallet created a reasonable inference that the property was stolen; the State's theory of the case was that defendant went back to the motel where he and the victim had been staying to get back what was rightfully his—the money in the victim's wallet, and the evidence, although circumstantial, supported this theory. During the State's case-in-chief, evidence was presented to establish that, after defendant left the motel earlier in the day, the victim feared his return, and when defendant did return and was unable to access the room, a motel employee told him that the door was locked from the inside; additional evidence was presented that defendant had received a significant amount of money from his mother for a business that he planned to start and that defendant was supporting the victim and was the source of the cash found inside her wallet. *Goff v. State*, 14 So. 3d 625 (Miss. 2009), modified by 2009 Miss. LEXIS 406 (Miss. Aug. 27, 2009), writ of certiorari denied by 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251, 78 U.S.L.W. 3480 (U.S. 2010).

Sufficient evidence existed to support defendant's conviction for capital murder when the evidence showed defendant was angry with the victim about his employment arrangement with the victim; defendant's girlfriend testified that defendant took the victim's money, credit cards, and car keys during the course of the murder. *Lima v. State*, 7 So. 3d 903 (Miss. 2009).

Evidence was sufficient to support defendant's convictions of murder and armed robbery where defendant's companions testified that they accompanied defendant to the victim's home seeking employment; that the victim told them that they could spend the night rather than driving all the way home; that defendant told them that he was going to rob the victim; that defendant headed toward the victim's bedroom after the victim retired; that as his companions left the home, they heard gunshots coming from the bedroom and that one looked back and saw defendant taking the victim's wallet out of his pocket; and that defendant jumped into their vehicle as they were departing and he had blood on him and was carrying a gun. Further evidence was justified defendant's conviction was testimony that defendant was angry with the victim for docking his pay after finding him sleeping on the job and the testimony of defendant's brother that defendant admitted commission of the offenses. *Lewis v. State*, 997 So. 2d 1001 (Miss. Ct. App. 2009).

Trial court did not err in denying a defendant's motions for a directed verdict and a judgment notwithstanding the verdict because the evidence was sufficient to support a conviction of three counts of armed robbery, under Miss. Code Ann. § 97-3-79, where the defendant took money from an illegal dice game at gunpoint in an amount that was more than what he claimed rightfully belonged to him. *Croft v. State*, 992 So. 2d 1151 (Miss. 2008).

Evidence was sufficient to sustain a conviction for attempted armed robbery because defendant disguised himself as a woman, entered the bank with his co-defendants, and shuffled around nervously as another defendant attempted to hold up the teller with a handgun, all the

while shielding his face from view. Thereafter, defendant was caught attempting to escape from the abandoned safe house and he was still wearing the same women's skirt that he wore during the attempted robbery. *Glenn v. State*, 996 So. 2d 148 (Miss. Ct. App. 2008).

Motion for a new trial was properly denied in an armed robbery case under Miss. Code Ann. § 97-3-79 because the verdict was not so contrary to the overwhelming weight of the evidence that it amounted to an unconscionable injustice where a victim identified defendant as the man who approached her in a store parking lot, demanded money, and tried to stab her. The victim testified that the parking lot was well lit, the victim had a lengthy encounter with defendant, she positively identified him from a photo lineup and later at trial, and a car matching the description given by the victim and registered to defendant's sister was located nearby; moreover, the conviction was still proper, even if the State was unable to prove that defendant obtained money from the victim. *Lafont v. State*, 9 So. 3d 1143 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 236 (Miss. 2009).

Evidence was sufficient to convict defendant of armed robbery because (1) two eyewitnesses stated that they gave defendant a ride to the casino on the evening of the robbery and that he returned shortly thereafter with a woman's purse; (2) they saw him go through the contents of the purse, pull out a cash voucher, and then throw the purse out the window; (3) the victim was able to identify defendant as the man who robbed her of her purse at gunpoint; (4) the victim stated that there was a cash voucher in her purse; and (5) two police officers testified that defendant confessed to robbing the victim at a casino; thus, defendant's motion for a judgment notwithstanding the verdict was properly denied. *Carey v. State*, 4 So. 3d 370 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 114 (Miss. 2009).

Defendant's motion for a new trial was properly denied where the evidence was sufficient to convict defendant of armed robbery, Miss. Code Ann. § 97-3-79; wit-

ness testimony identified defendant as one of the co-participants in the armed robbery and the accomplice testimony was reasonable and not improbable or self-contradictory. *Dorsey v. State*, 986 So. 2d 1080 (Miss. Ct. App. 2008).

Evidence was sufficient to sustain defendant's conviction for armed robbery because the State presented eyewitness testimony of the armed robbery and a positive identification of defendant as the perpetrator. The testimony of the store clerk was consistent with the evidence in the surveillance tape and photographs. *Jones v. State*, 993 So. 2d 386 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 503 (Miss. 2008).

Where defendant and his cohort had been riding around discussing ways to make money, they approached the victims' house, knocked on the door, made up a story about running out of gas, then shot two victims, and fled the house when one of the victims' did not go down after being shot multiple times. The State proved the essential elements of armed robbery in violation of Miss. Code Ann. § 97-3-79. *Hughes v. State*, 983 So. 2d 270 (Miss. 2008), writ of certiorari denied by 555 U.S. 1052, 129 S. Ct. 633, 172 L. Ed. 2d 620, 2008 U.S. LEXIS 8544, 77 U.S.L.W. 3324 (2008).

There was sufficient evidence to prove defendant committed armed robbery where witnesses testified that a store manager had a purse and bank deposits in her hand when the suspect snatched them and ran away, that they interpreted the suspect's comments, such as telling them not to move and not to be a hero, as threats, and that they were afraid; further, the suspect was wearing a mask, was dressed all in black, and displayed a knife, and officers tracked defendant's scent around the rear of a building, discovered defendant lying on the ground in the woods in the same spot as the bank bags. *Denman v. State*, 964 So. 2d 620 (Miss. Ct. App. 2007).

Although victims could not positively identify defendant as a second gunman who entered their apartment, they were able to provide police with a description, a stocking cap, clothing, and a gun; a rea-

sonable jury could have found defendant guilty of burglary and robbery beyond a reasonable doubt. Guyton v. State, 962 So. 2d 722 (Miss. Ct. App. 2007).

Trial court did not err by denying defendant's motions for judgment notwithstanding the verdict and for a new trial after he was convicted of rape, kidnapping, and armed robbery because the evidence, viewed in the light most favorable to the prosecution, showed that: (1) defendant bound the victim and forcibly raped her, threatening her with a knife; (2) DNA testing from the rape kit showed the presence of semen but no sperm in the victim's vagina, consistent with a male donor not reaching ejaculation; (3) defendant forced the victim into her car; and (4) defendant forced the victim to make an ATM withdrawal and give him the cash. Taggart v. State, 957 So. 2d 981 (Miss. 2007).

In an armed robbery case, where defendant challenged the weight of the evidence in his motion for a new trial, the evidence showed that: (1) there was detailed evidence from several sources establishing that three masked men effectuated a robbery of a store by threatening the cashier with a gun; (2) defendant was identified as the gunman by his two accomplices; and (3) defendant's general description was consistent with the description of the gunman given by the cashier; thus, the evidence did not preponderate so heavily against the verdict that an unconscionable injustice would result without a new trial and defendant's motion for a new trial was properly denied. Evans v. State, 957 So. 2d 430 (Miss. Ct. App. 2007).

Evidence was sufficient to convict defendant of armed robbery under Miss. Code Ann. § 97-3-79 because: (1) while the victim never testified that he was afraid or in fear, the evidence enabled a jury to find beyond a reasonable doubt that he anticipated that personal injury would result if he did not follow defendant's instructions; (2) the victim acknowledged that during the robbery he was nervous and worried about how his friends and relatives would fare without him; (3) an accomplice testified that, after a shot was fired, the victim prayed for forgiveness for his sins; and (4) the victim behaved compliantly when

threatened with the gun. Evans v. State, 957 So. 2d 430 (Miss. Ct. App. 2007).

Defendant's convictions for murder, armed robbery, and shooting into an occupied dwelling were appropriate because the evidence was sufficient: two witnesses testified to seeing defendant shoot the victim; a witness further testified to observing defendant removing the victim's clothing and wallet; and a female testified to a shot being fired through her front door at approximately the time that the victim was shot. Conner v. State, 971 So. 2d 630 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2007 Miss. LEXIS 682 (Miss. 2007).

Under Miss. Code Ann. § 97-3-79, the essential elements of armed robbery included: (1) a felonious taking or attempt to take; (2) from the person or from the presence; (3) the personal property of another; (4) against his will; (5) by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon; defendant's admission to accomplishing what the state intended to prove at trial was a sufficient factual basis for the trial judge to accept defendant's guilty plea for the crime of armed robbery. Gladney v. State, 963 So. 2d 1217 (Miss. Ct. App. 2007).

Defendant and his accomplice had consummated the act of armed robbery before they decided to return defendant's property to him because the offense was complete when they attempted the offense; thus, defendant was not entitled to a directed verdict, a peremptory instruction, or a judgment notwithstanding the verdict because abandonment could not occur after the crime had taken place. White v. State, 969 So. 2d 72 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 658 (Miss. 2007).

There was sufficient evidence to uphold a conviction for conspiracy to commit armed robbery under Miss. Code Ann. § 97-1-1 where the evidence showed that defendant was in a casino with the other perpetrators, he stood behind one of them as a robbery took place, he ran out with them, and he received a portion of stolen money. Quawrells v. State, 938 So. 2d 370 (Miss. Ct. App. 2006).

Defendant's conviction for armed robbery was proper because a store supervisor identified defendant from the surveillance tape of the robbery, an employee and his friend identified the jacket that defendant was wearing as the one the robber was wearing, and defendant was apprehended with the exact items stolen from the store as well as a gun. *McFarland v. State*, 936 So. 2d 960 (Miss. Ct. App. 2006).

In a capital murder case, the evidence was sufficient to sustain the underlying armed robbery because a witness testified that two males wearing ski masks and gloves and brandishing pistols entered the store, pointed their guns at the witness and the victim, ordered them to hand over the money, and the victim was shot and killed during the robbery. *Duncan v. State*, 939 So. 2d 772 (Miss. 2006).

13. — Exhibition or use of weapon.

Defendant's conviction for attempted armed robbery was supported by the evidence because the jury was presented with testimony and evidence that defendant attempted to feloniously take money from the victims against their will by putting them in fear of immediate injury by the exhibition of a deadly weapon, i.e., a gun. *Tugle v. State*, 68 So. 3d 691 (Miss. Ct. App. 2010), writ of certiorari denied by 69 So. 3d 767, 2011 Miss. LEXIS 416 (Miss. 2011).

Defendant's conviction for armed robbery and the denial of his motion for a new trial were both proper because his argument that he was only trying to get the money that he was owed was of no avail since there was no proposition that if a man collected a debt by force and threats, that he would not be guilty of robbery. Additionally, defendant admitted to pulling out a gun and pointing it at the victim. *McClendon v. State*, 17 So. 3d 184 (Miss. Ct. App. 2009).

Defendant's actions of entering the victim's home with a concealed pistol and shooting him once he learned that his accomplice failed to complete the robbery more than satisfied the requisite showing of an overt act in furtherance of his intent to rob the victim; there was abundant proof that defendant possessed the intent to rob the victim by placing him in fear

through the exhibition of a deadly weapon. The evidence was sufficient to support defendant's conviction for attempted armed robbery and conspiracy to commit armed robbery under Miss. Code Ann. § 97-3-79. *Wallace v. State*, 9 So. 3d 433 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 223 (Miss. 2009).

Evidence was sufficient to convict defendant of armed robbery where a bank teller testified that she believed that defendant had a weapon, that his note indicated that he had a gun, and that she was in fear for her life. *Lyons v. State*, 942 So. 2d 247 (Miss. Ct. App. 2006), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 269 (Miss. 2007).

Defendant's motion for judgment notwithstanding the verdict was properly denied because a reasonable jury could have found from the bank teller's testimony that defendant exhibited a deadly weapon during the robbery, even though no gun was recovered when defendant was detained minutes after the robbery and no gun was visible on the videotape of the robbery. *Clayton v. State*, 946 So. 2d 796 (Miss. Ct. App. 2006), writ of certiorari dismissed by 947 So. 2d 960, 2007 Miss. LEXIS 64 (Miss. 2007).

Trial court did not err in denying defendant's motion for a directed verdict where a jury heard defendant admit to using a pellet gun in order to rob a clerk at a store of money, cigarettes, and a car; there was testimony that a pellet gun could inflict serious bodily injury; therefore, there was sufficient evidence to support his armed robbery conviction. *Thomas v. State*, 936 So. 2d 964 (Miss. Ct. App. 2006).

14. Instructions; generally.

Three defendants' capital-murder convictions were appropriate because, although a limiting instruction given to the jury regarding confessions by defendants was not sufficient, no prejudice or manifest injustice resulted as to any defendant; each of the defendants gave sufficient evidence of his individual participation in the robbery of a gun store in his separate statements to support a capital-murder charge. *Anderson v. State*, 5 So. 3d 1088 (Miss. Ct. App. 2007), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss.

LEXIS 171 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 184 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 177 (Miss. 2009).

Defendant and his accomplice had consummated the act of armed robbery before they decided to return defendant's property to him because the offense was complete when they attempted the offense; thus, defendant was not entitled to a jury instruction on abandonment of the offense because it was already completed. *White v. State*, 969 So. 2d 72 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 658 (Miss. 2007).

16. —Lesser offenses.

Defendant pointed to no evidence by which a jury could find him not guilty of armed robbery and yet guilty of robbery or assault; having found that defendant did not abandon the crime of armed robbery until after its consummation, a lesser-included offense instruction was not warranted. *White v. State*, 969 So. 2d 72 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 658 (Miss. 2007).

18. Conviction of lesser offense.

Where a bank teller testified that defendant went through the bank line, placed a knife on the counter, and demanded money from two tellers, defendant was indicted for armed robbery in violation of Miss. Code Ann. § 97-3-79; the evidence was sufficient to support the jury's verdict convicting him of the lesser-included offense of robbery, as when police apprehended defendant he had a steak knife on his person. *Wilson v. State*, 935 So. 2d 945 (Miss. 2006), writ of certiorari denied by 549 U.S. 1348, 127 S. Ct. 2047, 167 L. Ed. 2d 780, 2007 U.S. LEXIS 4088, 75 U.S.L.W. 3554 (2007).

20. Sentence.

In a post-conviction relief case in which a pro se inmate had pled guilty to armed robbery, he argued unsuccessfully that constitutional rights were violated because he was sentenced to serve a mandatory 10-year sentence without the benefit of earned time. Pursuant to Miss. Code

Ann. § 47-5-139(1)(e), an inmate was not eligible for earned-time credit when the inmate had not served the mandatory time required for parole eligibility for a conviction of robbery or attempted robbery with a deadly weapon, and, pursuant to Miss. Code Ann. § 47-7-3(1)(d)(ii), he was not eligible for parole since he had been convicted of armed robbery after October 1, 1994. *Diggs v. State*, 46 So. 3d 361 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 636, 2010 Miss. LEXIS 561 (Miss. 2010).

Trial court did not err in denying an inmate's motion for post-conviction collateral relief because the inmate's sentence was not excessive since it was within the limits of the sentencing guidelines; because the inmate did in fact admit to aiding and abetting an armed robbery with a pistol in his plea colloquy, the trial judge stated that the minimum sentence was three years, and the maximum sentence was life imprisonment for the charge. *Cherry v. State*, 24 So. 3d 1048 (Miss. Ct. App. 2010).

The record justified the trial court in giving defendant, a habitual offender, 41 years without parole for three counts of armed robbery; the fact that defendant's actuarial life-expectancy was 41.7 years did not render the sentence grossly disproportionate in violation of his constitutional rights. *Johnson v. State*, 29 So. 3d 738 (Miss. 2009).

Where appellant pled guilty to two counts of capital murder and two counts of armed robbery in 1979, he filed several motions for post-conviction relief; the circuit court did not err by dismissing his 2007 motion for post-conviction relief as a successive writ barred by res judicata under Miss. Code Ann. § 99-39-21(1). Appellant's claim that he had a fundamental right to be free from an illegal sentence was not good cause for an exception to the bar, because his twenty-four year sentence for armed robbery was within the range set forth in Miss. Code Ann. § 97-3-79 and therefore not illegal. *Rowland v. State*, 42 So. 3d 545 (Miss. Ct. App. 2009), reversed by, remanded by 42 So. 3d 503, 2010 Miss. LEXIS 386 (Miss. 2010).

In an armed robbery case, defendant was improperly sentenced to life impris-

onment as a habitual offender under Miss. Code Ann. § 99-19-81 because a life sentence had to be, but was not, set by a jury. *Carey v. State*, 4 So. 3d 370 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 114 (Miss. 2009).

Where a defendant pleaded guilty to aggravated assault under Miss. Code Ann. § 97-3-7(2) and armed robbery under Miss. Code Ann. § 97-3-79 and was sentenced to consecutive incarcerations of 30 years for the robbery and 10 years for the assault, the trial court properly (1) summarily dismissed the defendant's petition for postconviction relief from the sentence without holding an evidentiary hearing because the defendant was aware that the trial court was not required to follow the State's recommended sentence, and the sentence imposed by the trial court was within statutory guidelines; or (2) finding that the defendant's plea was voluntary because the defendant had read and understood his guilty plea petition, which stated that the trial judge was not required to follow the State's sentencing recommendation. *Owens v. State*, 996 So. 2d 85 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 685 (Miss. 2008), writ of certiorari denied by 556 U.S. 1212, 129 S. Ct. 2060, 173 L. Ed. 2d 1140, 2009 U.S. LEXIS 3181, 77 U.S.L.W. 3595 (2009).

Where defendant was convicted of armed robbery after he and a cohort approached a home, shot two victims, and fled the scene, his sentence of thirty years' was within the statutory limitations set forth in Miss. Code Ann. § 97-3-79. Defendant failed to prove that the sentence was unconstitutional, because it did not punish him for exercising his right to trial nor was the sentence disproportionate to his role in the crime. *Hughes v. State*, 983 So. 2d 270 (Miss. 2008), writ of certiorari denied by 555 U.S. 1052, 129 S. Ct. 633, 172 L. Ed. 2d 620, 2008 U.S. LEXIS 8544, 77 U.S.L.W. 3324 (2008).

Because a sentence of 15 years with no eligibility for parole, imposed for armed robbery, was within the statutory limits, no error could be found in the trial court's alleged failure to weigh mitigating factors, nor could there be any inference of

gross disproportion. *Waddell v. State*, 999 So. 2d 375 (Miss. Ct. App. 2008).

In an armed robbery case, a motion for post-conviction relief was properly denied because defendant's plea was not involuntary or coerced in violation Miss. Unif. Cir. & Cty. R. 8.04 merely because counsel advised defendant to plead guilty or because defendant feared that he would get a life sentence under Miss. Code Ann. § 97-3-79. *Robinson v. State*, 964 So. 2d 609 (Miss. Ct. App. 2007).

Where defendant, who was 17 years of age at the time of his conviction and sentence, was sentenced to a 30-year term of imprisonment for armed robbery in accordance with what the state had recommended, and what defendant expected the state to recommend, the trial judge had statutory discretion to sentence defendant to a definite term reasonably expected to be less than life; in challenging his sentence, it was necessary for defendant to make some showing that his sentence exceeded the limits of Miss. Code Ann. § 97-3-79, but the sentence defendant received did not exceed the statutory maximum sentence allowed and was therefore legal. *Gladney v. State*, 963 So. 2d 1217 (Miss. Ct. App. 2007).

Motion for post-conviction relief was denied in case challenging the legality of a life sentence imposed for two counts of robbery with a deadly weapon because this was a permissible sentence where a jury did not impose the death penalty; the motion was timely, despite being filed about 30 years after the conviction, because an illegal sentence could have been challenged at any time. *McLeod v. State*, 952 So. 2d 302 (Miss. Ct. App. 2007).

Explanations given to defendant about the nature of the charge, the possible sentences and other consequences of the plea, and the plea bargaining process all pertained to armed robbery, not to simple robbery, and for this reason, defendant's guilty plea was not voluntary in a constitutional sense; nor was defendant accurately informed of the consequences of a guilty plea to robbery where the maximum sentence for armed robbery was life if fixed by the jury, Miss. Code Ann. § 97-3-79, and the maximum sentence for simple robbery was 15 years, Miss. Code Ann.

§ 97-3-75; when defendant evaluated the state's plea recommendation and made his decision to plead guilty, he was under the erroneous belief that he could be sentenced to life imprisonment were he to proceed to trial and be found guilty; when in fact he could have received only 15 years. *Garner v. State*, 944 So. 2d 934 (Miss. Ct. App. 2006), writ of certiorari dismissed by 951 So. 2d 563, 2007 Miss. LEXIS 534 (Miss. 2007).

Post-conviction relief was denied in a case where defendant pled guilty to two counts of armed robbery, in violation of Miss. Code Ann. § 97-3-79, because his attorney did not give erroneous advice since a life sentence was a possible sentence if a jury had convicted him of both counts; the record showed that defendant actively participated in the robbery, and he knew that people were going to be robbed. *Wortham v. State*, 952 So. 2d 968 (Miss. Ct. App. 2006).

Appellate court affirmed the denial of an inmate's petition for post-conviction relief pursuant to Miss. Code Ann. § 99-39-3 as the inmate was properly advised before pleading guilty, he was not deprived of effective assistance of counsel, and his 30 year sentence for armed robbery with 15 years suspended was proper under Miss. Code Ann. § 97-3-79. *Steen v. State*, 933 So. 2d 1052 (Miss. Ct. App. 2006).

Circuit court did not err in dismissing a petitioner's request for post-conviction relief because the petitioner's 25-year sentence for armed robbery was within the range prescribed by Miss. Code Ann. § 97-3-79. *Wells v. State*, 936 So. 2d 479 (Miss. Ct. App. 2006).

In defendant's capital murder case, a court did not err by not ordering a bifurcated sentencing hearing on the armed robbery because the decision whether or not to order a bifurcated trial rested within the trial court's discretion. *Duncan v. State*, 939 So. 2d 772 (Miss. 2006).

Inmate's petition for post-conviction relief was denied because the denial of the possibility of parole for an armed robbery conviction came from Miss. Code Ann. § 47-7-3(1)(d)(ii), not from a trial judge. *Hinton v. State*, 947 So. 2d 979 (Miss. Ct. App. 2006), writ of certiorari denied by

947 So. 2d 960, 2007 Miss. LEXIS 94 (Miss. 2007).

21. Miscellaneous.

Motion for a new trial was denied in a case where defendant was identified as the perpetrator in an armed robbery by the victim and another witness; defendant was picked from a photo lineup after a description was given to police of a robber, the victim had observed the robber's face for four minutes, and the victim testified that he would not forget the face of the robber. *Brownlee v. State*, 972 So. 2d 31 (Miss. Ct. App. 2008).

Motion for a directed verdict or judgment notwithstanding the verdict was denied in an armed robbery case under Miss. Code Ann. § 97-3-79 because the photo lineup was not impermissibly suggestive where other men could have had the same hairstyle, the victim had four minutes to look at the perpetrator's face during the crime, and the victim testified that he would never forget the perpetrator's face. Moreover, the evidence from the identification was for the jury to weigh. *Brownlee v. State*, 972 So. 2d 31 (Miss. Ct. App. 2008).

22. Double jeopardy.

In a case in which defendant appealed the dismissal of his motion for post-conviction relief, he argued unsuccessfully that he was subjected to double jeopardy because he was charged with armed robbery on three occasions: (1) in Count II of his indictment, (2) in Count IV of his indictment, and (3) when he pled guilty to the charge of armed robbery. The State filed an Order of Nolle Prosequi on Counts I, II, III, and V; therefore, the burglary charge in Count II was passed to the file, and defendant was no longer charged with nor convicted of Count II. *Ewing v. State*, 34 So. 3d 612 (Miss. Ct. App. 2009), writ of certiorari denied by 34 So. 3d 1176, 2010 Miss. LEXIS 245 (Miss. 2010).

Burglary conviction was upheld where acquittal on armed robbery charges did not invoke double jeopardy concerns because defendant was not previously tried for either of the charges and because the burglary charge did not contain the same elements, such as exhibiting a deadly weapon and putting the victim in fear;

similarly, the burglary included elements not found in armed robbery, such as breaking and entering. *Smallwood v.*

State, 930 So. 2d 448 (Miss. Ct. App. 2006).

RESEARCH REFERENCES

ALR. Cigarette Lighter as Deadly or Dangerous Weapon.. 22 A.L.R. 6th 533.

§ 97-3-95. Sexual battery.

Cross References — Mandatory reporting of offense under this section relating to sexual ‘battery when committed by an adult against a minor under the age of sixteen, see § 97-5-51.

JUDICIAL DECISIONS

4. Elements.
6. Indictment.
7. Evidence; generally; admissibility.
9. — Sufficiency.
10. —Other; miscellaneous.
11. Practice and procedure; jury instructions.
12. Sentence.
13. Other, miscellaneous.
14. Lesser included offenses.
15. Double jeopardy.
16. New trial.
17. Speedy trial.

4. Elements.

For purposes of a new trial, a guilty verdict in a sexual battery case was not against the overwhelming weight of the evidence because it was up to a jury to assess the reliability of a victim’s sister, who testified on the issue of penetration; moreover, even though defendant’s seminal fluid on the victim’s body did not prove penetration, the testimony of the sister and of police detectives regarding defendant’s admission of other instances of oral sex established that element of the crime. *Singleton v. State*, 16 So. 3d 742 (Miss. Ct. App. 2009).

In a sexual battery case under Miss. Code Ann. § 97-3-95(2) where penetration was an issue, a judgment notwithstanding the verdict was properly denied because it was up to a jury to determine the credibility of a victim’s sister, who testified that she saw defendant sticking his tongue in between the victim’s vagina; also, defen-

dant admitted to other instances of oral sex performed by the victim. *Singleton v. State*, 16 So. 3d 742 (Miss. Ct. App. 2009).

6. Indictment.

Indictment charged defendant with one count of touching a child for lustful purposes pursuant to Miss. Code Ann. § 97-5-23(1) and one count of sexual battery pursuant to Miss. Code Ann. § 97-3-95(1)(d), and the crimes formed a common scheme of sexual misconduct and all the crimes occurred over a period of time against the same victim in a similar manner; thus, the court rejected defendant’s claim that it was error for him to be tried on a multi-count indictment, for purposes of Miss. Code Ann. § 99-7-2, plus the court noted that the trial court instructed the jury to evaluate each count separately and return separate verdicts. *Wilson v. State*, 990 So. 2d 798 (Miss. Ct. App. 2008).

Where each count of the indictment specifically stated that defendant did willfully, unlawfully, and feloniously commit sexual battery by some form of sexual penetration or performing cunnilingus on the victim while defendant was above the age of eighteen and the victim was under the age of sixteen, the indictment was not fatally flawed because it tracked the language of both subsections (c) and (d) of Miss. Code Ann. § 97-3-95(1). The indictment included the birth date of both defendant and the victim as well as the time of the alleged offense; the fact that it

mistakenly referred to the victim as being under the age of sixteen instead of fourteen was irrelevant. *Smith v. State*, 989 So. 2d 973 (Miss. Ct. App. 2008).

Indictment for fondling and sexual battery was not defective for failing to provide the specific dates that the offenses occurred, as the state had narrowed the time frame sufficiently to put defendant on notice of the nature and cause of the charges against her. *Hodgin v. State*, 964 So. 2d 492 (Miss. 2007).

Denial of the inmate's motion for post-conviction relief was proper in part because the indictment was sufficient to charge a crime since it alleged that he engaged in sexual penetration with the victim against her will; thus, the indictment was sufficient to charge the crime of sexual battery. *Knight v. State*, 959 So. 2d 598 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 538 (Miss. 2007).

Defendant was properly convicted of sexually battery by digital penetration where sufficient proof showed that defendant was provided notice that he was being charged with sexual battery, and the variance between the language of the indictment and proof at trial was not a fatal error under Miss. Const. art. 3, § 26. *Burrows v. State*, 961 So. 2d 701 (Miss. 2007).

Although rape required forcible sexual intercourse, and sexual battery required sexual penetration without consent, the indictment specifically put defendant on notice that he was charged with forcibly inserting his sexual organ inside the victim's rectum; his defense to that charge was not that it happened and was consensual, but that it did not happen, and therefore his defense to the original indictment was equally applicable to amended indictment, which changed a charge from rape to sexual battery. *Goodin v. State*, 977 So. 2d 353 (Miss. Ct. App. 2007), affirmed in part and reversed in part by, remanded by 977 So. 2d 338, 2008 Miss. LEXIS 143 (Miss. 2008).

In a sexual battery case, the indictment was properly amended by the removal of the phrase "without her consent," because the defense to the charge did not change, and although defendant might have as-

serted that he was surprised, his surprise could not be characterized as unfair; the net effect of the amendment was that defendant only had to defend one claim, rather than two. *Lee v. State*, 944 So. 2d 35 (Miss. 2006).

Where the state dismissed one indictment for sexual battery in exchange for defendant's guilty plea to gratification of lust, it was not a dismissal based on it being defective; however, even if it had been, the second indictment was sufficient to charge a crime where it alleged that defendant engaged in sexual penetration with a child under the age of 14 against her will. *Knight v. State*, 956 So. 2d 264 (Miss. Ct. App. 2006), substituted opinion at 959 So. 2d 598, 2007 Miss. App. LEXIS 444 (Miss. Ct. App. 2007).

Defendant argued that his indictment should have stated that the penetration was knowingly or intentionally committed; however, sexual battery was not a specific intent crime and thus the indictment did not have to refer to a specific intent, and the indictment was valid. *Jones v. State*, 936 So. 2d 993 (Miss. Ct. App. 2006).

Trial court properly refused to merge two counts of an indictment charging defendant with sexual battery because the two counts alleged two separate acts of penetration; the first count charged that defendant inserted his tongue into the victim's vagina, while the second count charged that defendant inserted his penis into the victim's vagina. *Hill v. State*, 929 So. 2d 375 (Miss. Ct. App. 2006).

7. Evidence; generally; admissibility.

Denial of defendant's motion for judgment of acquittal notwithstanding the verdict and, in the alternative, motion for a new trial, after he had been convicted of sexual battery in violation of Miss. Code Ann. § 97-3-95(1)(a) was appropriate because the evidence was sufficient to support the conviction. The case consisted largely of the victim's word against defendant's and that presented a factual dispute to be resolved by a jury; the supreme court was unable to determine that any rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt after the evidence was viewed in the light most favorable to the

State. *Abernathy v. State*, 30 So. 3d 320 (Miss. 2010).

At trial for fondling and sexual battery, it was not error under the circumstances presented to accept a witness as an expert in the field of child abuse, allow an unredacted videotape of the child victim's interview to be admitted into evidence, or to allow the victim's mother to testify as to statements that the victim made to her. *Hodgin v. State*, 964 So. 2d 492 (Miss. 2007).

9. — Sufficiency.

Sufficient evidence supported defendant's conviction for sexual battery of his daughter, in violation of Miss. Code Ann. § 97-3-95(2) (Rev. 2006), where the parties presented the jury with two varying theories on how defendant's DNA arrived inside of his daughter's vagina, and the jury considered the evidence and testimony presented by both parties and reached their verdict based on this information. The credibility of witness testimony was the province of the jury. *Wilson v. State*, 72 So. 3d 1145 (Miss. Ct. App. 2011), writ of certiorari denied by 71 So. 3d 1207, 2011 Miss. LEXIS 513 (Miss. 2011).

Evidence was sufficient to convict defendant of sexual battery even though the State failed to establish that the crime occurred within the time frame alleged in the indictment and offense-tracking instruction. Defendant was not prejudiced by the variance and the proof showed the crime could have occurred reasonably near the time frame alleged. *McBride v. State*, 61 So. 3d 138 (Miss. 2011).

Defendant's conviction for sexual battery of a seven-year-old child, his nephew, in violation of Miss. Code Ann. § 97-3-95(1)(d), was supported by the evidence because the evidence was sufficient to sustain a conviction based on fellatio-based sexual battery under Miss. Code Ann. § 97-3-97(a); when asked to draw an "X" where defendant put his mouth, the victim drew an "X" on the penis on an anatomically-correct drawing of a male child. *Beasley v. State*, 74 So. 3d 357 (Miss. Ct. App. 2010).

Defendant's conviction for the sexual battery of his minor daughter in violation of Miss. Code Ann. § 97-3-95(1)(d) was

appropriate because, while the testimony of the victim as to her age during the incident's time frame was vague, viewing the evidence in the light most favorable to the State, there was sufficient evidence for a reasonable juror to have found that she was sexually battered well before her fourteenth birthday and within the parameters of the indictment's stated dates of "on or about or between" January 2002 and December 2005. *McBride v. State*, 61 So. 3d 174 (Miss. Ct. App. 2010), superseded by 61 So. 3d 138, 2011 Miss. LEXIS 245 (Miss. 2011).

Fact that the jury did not find defendant guilty of sexual battery did not vitiate the evidence as to touching; it simply meant that the jury was discerning and did not find sufficient evidence to support the sexual battery charges. *Dubose v. State*, 22 So. 3d 340 (Miss. Ct. App. 2009).

Defendant's conviction for sexual battery was appropriate because his conviction was not against the overwhelming weight of the evidence. The victim, who was 12 years old at the time, testified that she had been repeatedly raped by defendant, and her testimony was corroborated by her father's testimony and a medical examination. *Tanner v. State*, 20 So. 3d 764 (Miss. Ct. App. 2009).

Defendant's conviction of sexual battery and child fondling was supported by sufficient evidence where the victim, defendant's stepdaughter, testified that defendant fondled her breasts and genitals, inserted a vibrator into her vagina, and attempted vaginal penetration with his penis when she was between the ages of nine and ten years old. Further, the victim's grandmother testified that the victim admitted that defendant was "touching her" and that she took the victim to a doctor specializing in gynecology for a physical, and the doctor testified that her examination of the victim revealed tears in her hymen, which were consistent with and evidence of trauma. *Tate v. State*, 20 So. 3d 623 (Miss. 2009).

Evidence was sufficient to sustain defendant's conviction for sexual battery, and a jury's verdict was not against the weight of the evidence, because the evidence, which was based on medical evidence, the testimony of the victim, the

testimony of a nurse, and defendant's admissions, showed that penetration of the nine-year-old victim had occurred. *Ruiz v. State*, 22 So. 3d 309 (Miss. Ct. App. 2009).

Verdict convicting defendant of sexual battery for sexual penetration of a five-year-old girl by inserting his fingers into her vagina, in violation of Miss. Code Ann. § 97-3-95(1)(d), was not against the weight of the evidence because the victim testified that defendant put his fingers in her private parts; the victim's testimony was corroborated by her brother, who witnessed the incident, and by a nurse who examined her. *Valmain v. State*, 5 So. 3d 1079 (Miss. 2009).

Trial court did not err when it denied defendant's motion for a new trial where the jury's verdict was not against the overwhelming weight of the evidence; the victim's testimony regarding the incidents of sexual battery was never discredited, and all other witness testimony was consistent with the victim's account, and the fact that the jury did not believe defendant's theory of the case did not render the verdict untenable. *Caldwell v. State*, 6 So. 3d 1076 (Miss. 2009).

Evidence as sufficient to support defendant's convictions of burglary, kidnapping, and sexual battery where the father of the two-year-old victim testified that he went to pick up his girlfriend from work and left his children secured in their home, that he encountered the 17-year-old defendant while en route and told him where he was going, that he discovered upon his return that his home had been broken into and that his daughter was missing, that he found defendant with his daughter in an abandoned structure nearby, and that, upon examination, the girl's genital area was red, bleeding, and scratched and where a physician who examined the victim testified that the girl's vagina was red, swollen, and irritated but that there was no evidence of infection as the cause. Because the two-year-old victim was too short to have unlocked the door to the family home by herself and had never walked out of the home unassisted, the evidence permitted the jury to reasonably infer that defendant had broken into the family residence, removed the victim therefrom without her father's permis-

sion, and sexually assaulted her. *Moton v. State*, 999 So. 2d 1287 (Miss. Ct. App. 2009).

Evidence was sufficient to sustain defendant's conviction of sexual battery, under Miss. Code Ann. § 97-3-95(1)(a), and for the denial of defendant's motion for judgment notwithstanding the verdict because the victim's testimony of a non-consensual assault, although unsupported, was not discredited or contradicted by other credible evidence and because the DNA testing identified the defendant as the source of the semen found in the victim's vaginal vault. *Wilkins v. State*, 1 So. 3d 850 (Miss. 2008).

Defendant's conviction for sexual battery of a 22-year-old mentally retarded woman, in violation of Miss. Code Ann. § 97-3-95(1)(b), was supported by the evidence because, based on testimony by the victim's mother, the jury could have found beyond a reasonable doubt that sexual penetration, as defined in Miss. Code Ann. § 97-3-97(a), was occurring at the moment the mother walked in on the victim and defendant. *Holmes v. State*, 20 So. 3d 681 (Miss. Ct. App. 2008), writ of certiorari denied by 20 So. 3d 680, 2009 Miss. LEXIS 543 (Miss. 2009).

Jury was faced with the victim's account of the crime versus defendant's denial and weighing the evidence in the light most favorable to the verdict, the court could not find that allowing defendant's conviction under Miss. Code Ann. §§ 97-5-23(1), 97-3-95(1)(d) to stand would sanction an unconscionable injustice. *Wilson v. State*, 990 So. 2d 798 (Miss. Ct. App. 2008).

Victim testified that defendant had placed two fingers inside her and the jury clearly found the victim's testimony to be more credible and resolved any conflicts in favor of the victim, and thus the evidence was sufficient to support defendant's conviction of sexual battery under Miss. Code Ann. § 97-3-95(1)(d). *Wilson v. State*, 990 So. 2d 798 (Miss. Ct. App. 2008).

Where the State presented credible testimony from the seven-year-old victim, a social worker, a nurse specializing in sexual assault examinations, and an investigator with the sheriff's department, the evidence was sufficient to establish the elements of sexual battery in violation of

Miss. Code Ann. § 97-3-95. Tests showed that the victim's hymen had been broken, and she was infected with gonorrhea, and there were abnormalities in the victim's vagina and anus indicating penetration with a blunt object, consistent with penetration by a penis. *Reed v. State*, 987 So. 2d 1054 (Miss. Ct. App. 2008).

Victim's testimony that defendant sexually abused her was not discredited or contradicted by other credible evidence, and the jury believed the testimony of the victim, her mother, and her doctor; therefore, there was sufficient and credible evidence for a reasonable jury to find defendant guilty of sexual battery beyond a reasonable doubt. *Morgan v. State*, 995 So. 2d 812 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 661 (Miss. 2008).

Denial of appellant's, an inmate's, request for post-conviction relief after he was convicted of capital murder (murder during the commission of sexual battery) was appropriate because he failed to prove that he received the ineffective assistance of counsel. Even if counsel had procured a DNA expert who testified that the inmate's DNA was not present, that did not exonerate the inmate of the sexual battery charge because sexual penetration could be by insertion of any object into the genital or anal opening of another person's body. *Havard v. State*, 988 So. 2d 322 (Miss. 2008).

In defendant's criminal prosecution for sexual battery in violation of Miss. Code Ann. § 97-3-95, the victim testified that when she was nine years old defendant touched her with his private parts while he was dating her mother; the testimony of six witnesses showed a consistency in the victim's allegations and expert testimony showed that the victim exhibited the physical and psychological characteristics of a sexually abused child. There was sufficient proof to establish the essential elements of sexual battery under Miss. Code Ann. § 97-3-95(1)(c); the trial court did not err in denying defendant's motions for a directed verdict. *Smith v. State*, 989 So. 2d 973 (Miss. Ct. App. 2008).

Defendant's conviction for sexual battery of a minor at least 14 years of age but

under 16 years of age in violation of Miss. Code Ann. § 97-3-95(1)(c) was appropriate because, based on the closeness of the victim's birthday and the estimated date of conception, the jury could have reasonably determined that the victim was 14 at the time the baby was conceived with defendant as the father. The crime of sexual battery was committed against the victim and the DNA evidence, if believed as it was by the jury, indicated that defendant was the perpetrator. *Jones v. State*, 991 So. 2d 629 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 495 (Miss. 2008).

Evidence was sufficient to support a conviction of child sexual abuse, despite the fact that there was no physical evidence of sexual penetration, because the jury could have inferred that such occurred in the form of cunnilingus. The six-year-old victim stated that defendant had taken her into his trailer, told her about sex, and licked her bottom; it was shown that the child was unable to distinguish between her genital and anal area due to her age. *Pierce v. State*, 2 So. 3d 641 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 93 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 113, 175 L. Ed. 2d 74, 2009 U.S. LEXIS 5318, 78 U.S.L.W. 3173 (U.S. 2009).

Evidence was sufficient to convict defendant of sexual battery where although he stated that the evidence was insufficient to sustain his conviction, he did not elaborate as to why he considered the evidence insufficient; the victim testified that defendant placed his finger in her vagina against her will, and the jury believed the victim over defendant. *Leonard v. State*, 972 So. 2d 24 (Miss. Ct. App. 2008).

Evidence was sufficient to convict defendant of sexual battery where there was ample evidence to support the jury's verdict; the jury heard the victim's testimony in which she described the various inappropriate ways defendant touched her, and the jury also heard defendant's recorded phone conversations with the victim. *Williams v. State*, 970 So. 2d 727 (Miss. Ct. App. 2007).

Post-conviction relief was denied where there was a factual basis for a plea to

sexual battery under Miss. Code Ann. § 97-3-95(1)(a), (d); defendant confessed to police that he penetrated a 13-year-old when he was 25, the victim stated that she was the victim of forcible intercourse, and the medical evidence showed that she had been vaginally penetrated. *Parkman v. State*, 953 So. 2d 315 (Miss. Ct. App. 2007).

In a sexual battery case, defendant's motion for a directed verdict was properly denied because the state showed that penetration occurred through a child victim's testimony and that of a doctor; the victim stated that defendant put his finger in her "middle spot," and an examination revealed that she had an inflamed hymen. *Pryer v. State*, 958 So. 2d 818 (Miss. Ct. App. 2007).

Trial court did not err by denying defendant's motion for a new trial because the evidence weighed in the light most favorable to the verdict supported the jury's resolution of the conflicting testimony; the evidence presented in defendant's trial for sexual battery and fondling included: (1) the victim's testimony in graphic detail as to the licking and touching that she endured from defendant; (2) defendant exercised his right to testify and testified that he did nothing wrong to the victim, his stepdaughter, but that the victim just wanted him out of the house; and (3) an investigator testified regarding what defendant stated in his written statement as well as statements defendant made that he did not want in the written statement. *Ivy v. State*, 949 So. 2d 748 (Miss. 2007).

Trial court did not err by denying defendant's motion for judgment notwithstanding the verdict because there was sufficient evidence to convict defendant of both sexual battery and fondling; the victim testified that, inter alia: (1) defendant licked her everywhere, including between her legs and her chest; (2) defendant penetrated the victim's vagina with his tongue; (3) defendant pulled off the victim's panties in order to fondle and lick her; (4) defendant pulled up her shirt to lick her chest; (5) defendant tried to insert his thumb inside the victim; (6) and the victim was 13 years old at the time, and defendant was her stepfather. *Ivy v. State*, 949 So. 2d 748 (Miss. 2007).

Based on the doctor's testimony concerning the victim's injuries to his rectum which he stated were consistent with sexual battery and the victim's testimony that defendant assaulted him, the evidence was sufficient for the jury to draw a reasonable inference that defendant sexually penetrated the victim's rectum; thus, defendant's sexual battery conviction was affirmed. *Divine v. State*, 947 So. 2d 1017 (Miss. Ct. App. 2007).

There was sufficient evidence for a jury to find defendant guilty of sexual battery, in violation of Miss. Code Ann. § 97-3-95(d), where the testimony of the seven-year-old victim's sister and a forensic interviewer and social worker bolstered the victim's testimony that defendant, when he was 17 years old, inserted his finger into the victim's vagina. *McClure v. State*, 941 So. 2d 896 (Miss. Ct. App. 2006).

Evidence was sufficient to convict defendant of attempted sexual battery pursuant to Miss. Code Ann. § 97-1-7 and Miss. Code Ann. § 97-3-95(1)(a) and (d) because, inter alia: (1) there was evidence that defendant intended to penetrate the six-year-old victim's privates with his privates, which satisfied the definition of penetration under Miss. Code Ann. § 97-3-97(a); and (2) at the time of the incident, defendant, who was 18, was more than two years older than the victim. *Bracken v. State*, 939 So. 2d 826 (Miss. Ct. App. 2006).

In a sexual battery case, the weight of the evidence supported defendant's convictions because a doctor testified that she found lacerations to the victim's rectum consistent with molestation, and witnesses testified that the victim told them that defendant molested him. *Davis v. State*, 933 So. 2d 1014 (Miss. Ct. App. 2006).

Sufficient evidence existed to convict defendant of sexual battery because the victim, an eight-year-old girl, testified that defendant took her into another room where he pulled down his pants and made her commit an oral act on his penis. *Curry v. State*, 943 So. 2d 78 (Miss. Ct. App. 2006).

10. —Other; miscellaneous.

Denial of defendant's motion for judgment of acquittal notwithstanding the

verdict and, in the alternative, motion for a new trial, after he had been convicted of sexual battery in violation of Miss. Code Ann. § 97-3-95(1)(a) was appropriate because the defense failed to make a sufficient proffer after the trial court excluded a doctor's testimony. Further, even finding that the doctor's testimony would have been relevant, the record was insufficient for the supreme court to determine whether it could have survived under the Miss. R. Evid. 403 balancing test for admissibility. *Abernathy v. State*, 30 So. 3d 320 (Miss. 2010).

Defendant's conviction for sexual battery of child under the age of 14 in violation of Miss. Code Ann. § 97-3-95(1) was appropriate because the admission of the testimony of a forensic interviewer and a doctor who was an expert in forensic interviewing and child abuse was not erroneous. The record did not show that those witnesses failed to reliably apply the principles of their expertise to the case. *Carter v. State*, 996 So. 2d 112 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2009 Miss. LEXIS 43 (Miss. 2009).

Admission of testimony by a child's mother was improper under Miss. R. Evid. 803(25) because there was no hearing conducted; moreover, it was inadmissible under Miss. R. Evid. 803(1), (2) because the child made the statement to the mother long after alleged sexual abuse. However, the error was harmless where the evidence came in through Miss. R. Evid. 803(4) due to an examination by a doctor. *Pierce v. State*, 2 So. 3d 641 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 93 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 113, 175 L. Ed. 2d 74, 2009 U.S. LEXIS 5318, 78 U.S.L.W. 3173 (U.S. 2009).

Evidence that a child victim had allegedly caused injuries to his own rectum by sticking objects there was properly excluded in a sexual battery case because it was irrelevant under Miss. R. Evid. 401 and highly prejudicial under Miss. R. Evid. 403, and it was also a collateral issue that was too remote in time to rebut the charges based on the fact that it was a year before the charges in an indictment; case law under Miss. R. Evid. 412 was helpful in making this determination, de-

spite the fact that the victim's actions did not constitute clear sexual activity. *Mason v. State*, 971 So. 2d 618 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 244, 2007 Miss. LEXIS 701 (Miss. 2007).

Defendant's conviction for sexual battery in violation of Miss. Code Ann. § 97-3-95 was proper because, without more, the victim's use of the "I have a friend" approach in a letter, did not cast doubt on her credibility, and thus the appellate court was unable to find reversible error in permitting testimony under Miss. R. Evid. 803(25). *Larson v. State*, 957 So. 2d 1005 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 318 (Miss. 2007).

11. Practice and procedure; jury instructions.

In defendant's sexual battery prosecution under Miss. Code Ann. § 97-3-95(2) (Rev. 2006), the jury was properly instructed that if it found that defendant possessed the status of the victim's parent, then it must find that he held a position of trust or authority over the victim. *Wilson v. State*, 72 So. 3d 1145 (Miss. Ct. App. 2011), writ of certiorari denied by 71 So. 3d 1207, 2011 Miss. LEXIS 513 (Miss. 2011).

Defendant argued that a sexual battery instruction proved an element of the crime, namely that the child was under the age of 14, but defendant was procedurally barred from raising this issue for the first time on appeal, plus the victim's age at the time of the crime was sufficiently established. *Wilson v. State*, 990 So. 2d 798 (Miss. Ct. App. 2008).

Instructing the jury that in order to sustain a conviction for the crime of sexual battery some penetration had to be proven beyond a reasonable doubt, however, it did not need to be full penetration, and even the slightest penetration was sufficient to prove the crime of sexual battery, was proper. *Wilson v. State*, 990 So. 2d 798 (Miss. Ct. App. 2008).

Where the instruction given to the jury regarding sexual battery did not require the jury to find that the penetration was without consent as required by Miss. Code Ann. § 97-3-95, defendant was entitled to

a new trial. *Goodin v. State*, 977 So. 2d 338 (Miss. 2008).

Where a doctor who examined the victim testified that the victim's rectum was swollen and there was a tear on the opening into the rectum, and he stated that those injuries were consistent with sexual battery, the evidence clearly indicated that the victim was sexually penetrated pursuant to the sexual battery statute, Miss. Code Ann. § 97-3-95(1)(d); with regard to the statement by the victim's grandmother that the victim had told lies before, the evidence did not rise to the level of conflicting evidence warranting a lustful touching jury instruction, and thus the trial court did not err in denying the jury instruction on the lesser-included offense of lustful touching. *Divine v. State*, 947 So. 2d 1017 (Miss. Ct. App. 2007).

12. Sentence.

Defendant's sentence was affirmed because the trial judge was well within his authority in Miss. Code Ann. § 99-19-21 to impose concurrent or consecutive sentences, and pursuant to Miss. Code Ann. § 99-7-2(3), the court could impose separate sentences for each of his sexual battery of a minor convictions under Miss. Code Ann. § 97-3-95(1)(d). *Eason v. Epps*, 32 So. 3d 538 (Miss. Ct. App. 2009).

13. Other, miscellaneous.

Offender was required to continue registering as a sex offender under Miss. Code Ann. § 45-33-47(2)(b)(ix) due to his guilty plea to a Maryland sex offense because: (1) the offender admitted in his plea that he had placed his hands on the victim's vagina without her consent; and (2) his conduct and plea satisfied the elements of the Mississippi crime of attempted sexual battery, which was a registrable offense under Miss. Code Ann. § 45-33-25(1). *Stallworth v. Miss. Dep't of Pub. Safety*, 986 So. 2d 259 (Miss. 2008).

14. Lesser included offenses.

In a sexual battery, the circuit court did not err in denying defendant's proposed lesser-included-offense instruction for simple assault because sexual battery (the superior offense) could have been committed without a simple assault (the putative lesser-included offense) being committed.

Thus, the elements of the separate offenses were distinctly different. *Wallace v. State*, 10 So. 3d 913 (Miss. 2009).

15. Double jeopardy.

Defendant was properly convicted of sexual battery in violation of Miss. Code Ann. § 97-3-95(d)(1) and unlawful touching of a child under the age of sixteen in violation of Miss. Code Ann. § 97-5-23 because his rights under the Double Jeopardy Clause were not violated when the record clearly evinced two separate acts of touching, and the State presented separate and independent proof of each charge; defendant sexually assaulted the victim in her living room when he committed statutory rape and sexually assaulted her again when he committed sexual battery by inserting his finger into her anus, and evidence was presented by numerous witnesses that the victim consistently described a second act of touching at a different time and in a different location of the house. *Woods v. State*, 30 So. 3d 362 (Miss. Ct. App. 2009).

Crime of sexual abuse of a vulnerable person under Miss. Code Ann. § 43-47-19 does not encompass the crime of sexual battery under Miss. Code Ann. § 97-3-95, and a conviction of both offenses does not implicate double jeopardy concerns because the crimes require additional and different elements of proof; specifically, the former offense does not require proof of penetration, while the latter offense does require this proof. Additionally, abuse of a vulnerable person requires proof that defendant willfully inflicted physical pain or injury upon a vulnerable person, while sexual battery has no such requirement; there are additional differences in that sexual battery does not require that the victim's abilities to provide for his or her protection from sexual contact be impaired by the infirmities of aging or that the victim be a patient or resident of a care facility, while the charge of abuse of a vulnerable person does require this additional element. *Simoneaux v. State*, 29 So. 3d 26 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 115 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 151, 178 L. Ed. 2d 38, 2010 U.S. LEXIS 6093, 79 U.S.L.W. 3196 (U.S. 2010).

16. New trial.

Defendant's motion for a new trial was properly denied because jury's verdict did not amount to an unconscionable injustice and because the evidence did not preponderate heavily against the jury's verdict finding defendant guilty of sexual battery involving an eight-year-old boy where the evidence included testimony of the victim, the victim's mother, the nurse who examined the victim on the night of the attack, a serologist who determined that the dried secretions found on the buttocks of the victim were seminal fluid, and members of the police department who participated in the investigation. The victim maintained a largely consistent story from his first reports to his testimony on the stand, and all of the State's witnesses presented testimony that implicated defendant; even though there was some conflicting evidence presented by the defense and the defense presented an alibi, the evidence presented by the State was of such a level that the guilty verdict was not against the overwhelming weight of the evidence. *Bolden v. State*, 23 So. 3d 491 (Miss. Ct. App. 2009), writ of certiorari denied by 22 So. 3d 1193, 2009 Miss. LEXIS 614 (Miss. 2009).

In a case involving sexual battery of a child under Miss. Code Ann. § 97-3-95, a trial court did not err by denying defendant's request for a new trial or a directed verdict because, although there was no physical evidence against defendant, the victim's testimony was corroborated by a doctor, who found signs of sexual abuse during an examination. Moreover, the verdict did not sanction an unconscionable result. *Steadham v. State*, 995 So. 2d 835 (Miss. Ct. App. 2008).

In a child sexual abuse case where a six-year-old victim stated that defendant had taken her into his trailer, told her

about sex, and licked her bottom, no new trial was required because the verdict was not against the overwhelming weight of the evidence; the child's statement was admissible into evidence, a neighbor observed the child go into defendant's trailer, and defendant was shown to live near the child. *Pierce v. State*, 2 So. 3d 641 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 93 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 113, 175 L. Ed. 2d 74, 2009 U.S. LEXIS 5318, 78 U.S.L.W. 3173 (U.S. 2009).

17. Speedy trial.

Defendant's conviction for the sexual battery of his minor daughter in violation of Miss. Code Ann. § 97-3-95(1)(d) was appropriate because he failed to raise his statutory right to a speedy trial specifically under Miss. Code Ann. § 99-17-1. Additionally, when he raised his constitutional right to a speedy trial, it was well past the 270-day requirement of the statute. *McBride v. State*, 61 So. 3d 174 (Miss. Ct. App. 2010), superseded by 61 So. 3d 138, 2011 Miss. LEXIS 245 (Miss. 2011).

Defendant's conviction for the sexual battery of his minor daughter in violation of Miss. Code Ann. § 97-3-95(1)(d) was appropriate because he was not denied his constitutional right to a speedy trial since, while there was a delay in the trial, there was no evidence the State deliberately created the delay, nor did defendant object in any way to the delay until the case was set for trial a month later. Further, when defendant did object, he requested the charges be dropped and not that the case be heard sooner; there was also no prejudice to the defense due to the delay. *McBride v. State*, 61 So. 3d 174 (Miss. Ct. App. 2010), superseded by 61 So. 3d 138, 2011 Miss. LEXIS 245 (Miss. 2011).

§ 97-3-97. Sexual battery; definitions.**JUDICIAL DECISIONS**

2. Sexual penetration.
3. Indictment.

2. Sexual penetration.

Defendant's conviction for sexual battery of a seven-year-old child, his nephew, in violation of Miss. Code Ann. § 97-3-95(1)(d), was supported by the evidence because the evidence was sufficient to sustain a conviction based on fellatio-based sexual battery, which was sexual penetration under Miss. Code Ann. § 97-3-97(a); when asked to draw an "X" where defendant put his mouth, the victim drew an "X" on the penis on an anatomically-correct drawing of a male child. *Beasley v. State*, 74 So. 3d 357 (Miss. Ct. App. 2010).

Seminal fluid found on a victim's body does not constitute penetration under Miss. Code Ann. § 97-3-97. *Singleton v. State*, 16 So. 3d 742 (Miss. Ct. App. 2009).

For purposes of a new trial, a guilty verdict in a sexual battery case was not against the overwhelming weight of the evidence because it was up to a jury to assess the reliability of a victim's sister, who testified on the issue of penetration; moreover, even though defendant's seminal fluid on the victim's body did not prove penetration, the testimony of the sister and of police detectives regarding defendant's admission of other instances of oral sex established that element of the crime. *Singleton v. State*, 16 So. 3d 742 (Miss. Ct. App. 2009).

In a sexual battery case under Miss. Code Ann. § 97-3-95(2) where penetration was an issue, a judgment notwithstanding the verdict was properly denied because it was up to a jury to determine the credibility of a victim's sister, who testified that she saw defendant sticking his tongue in between the victim's vagina; also, defendant admitted to other instances of oral sex performed by the victim. *Singleton v. State*, 16 So. 3d 742 (Miss. Ct. App. 2009).

Defendant's conviction for sexual battery of a 22-year-old mentally retarded woman, in violation of Miss. Code Ann. § 97-3-95(1)(b), was supported by the evidence because, based on testimony by the

victim's mother, the jury could have found beyond a reasonable doubt that sexual penetration, as defined in Miss. Code Ann. § 97-3-97(a), was occurring at the moment the mother walked in on the victim and defendant. *Holmes v. State*, 20 So. 3d 681 (Miss. Ct. App. 2008), writ of certiorari denied by 20 So. 3d 680, 2009 Miss. LEXIS 543 (Miss. 2009).

Denial of appellant's, an inmate's, request for postconviction relief after he was convicted of capital murder (murder during the commission of sexual battery) was appropriate because he failed to prove that he received the ineffective assistance of counsel. Even if counsel had procured a DNA expert who testified that the inmate's DNA was not present, that did not exonerate the inmate of the sexual battery charge because sexual penetration could be by insertion of any object into the genital or anal opening of another person's body. *Havard v. State*, 988 So. 2d 322 (Miss. 2008).

Evidence was sufficient to support a conviction of child sexual abuse, despite the fact that there was no physical evidence of sexual penetration, because the jury could have inferred that such occurred in the form of cunnilingus. The six-year-old victim stated that defendant had taken her into his trailer, told her about sex, and licked her bottom; it was shown that the child was unable to distinguish between her genital and anal area due to her age. *Pierce v. State*, 2 So. 3d 641 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 93 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 113, 175 L. Ed. 2d 74, 2009 U.S. LEXIS 5318, 78 U.S.L.W. 3173 (U.S. 2009).

Based on the doctor's testimony concerning the victim's injuries to his rectum which he stated were consistent with sexual battery and the victim's testimony that defendant assaulted him, the evidence was sufficient for the jury to draw a reasonable inference that defendant sexually penetrated the victim's rectum;

thus, defendant's sexual battery conviction was affirmed. *Divine v. State*, 947 So. 2d 1017 (Miss. Ct. App. 2007).

Where a doctor who examined the victim testified that the victim's rectum was swollen and there was a tear on the opening into the rectum, and he stated that those injuries were consistent with sexual battery, the evidence clearly indicated that the victim was sexually penetrated pursuant to the sexual battery statute, Miss. Code Ann. § 97-3-95(1)(d); with regard to the statement by the victim's grandmother that the victim had told lies before, the evidence did not rise to the level of conflicting evidence warranting a lustful touching jury instruction, and thus the trial court did not err in denying the jury instruction on the lesser-included offense of lustful touching. *Divine v. State*, 947 So. 2d 1017 (Miss. Ct. App. 2007).

There was sufficient evidence for a jury to find defendant guilty of sexual battery, in violation of Miss. Code Ann. § 97-3-95(d), where the testimony of the seven-year-old victim's sister and a forensic interviewer and social worker bolstered the victim's testimony that defendant, when he was 17 years old, inserted his finger into the victim's vagina. *McClure v. State*, 941 So. 2d 896 (Miss. Ct. App. 2006).

Evidence was sufficient to convict defendant of attempted sexual battery pursu-

ant to Miss. Code Ann. § 97-1-7 and Miss. Code Ann. § 97-3-95(1)(a) and (d) because, *inter alia*: (1) there was evidence that defendant intended to penetrate the six-year-old victim's privates with his privates, which satisfied the definition of penetration under Miss. Code Ann. § 97-3-97(a); and (2) at the time of the incident, defendant, who was 18, was more than two years older than the victim. *Bracken v. State*, 939 So. 2d 826 (Miss. Ct. App. 2006).

Trial court properly refused to merge two counts of an indictment charging defendant with sexual battery because the two counts alleged two separate acts of penetration; the first count charged that defendant inserted his tongue into the victim's vagina, while the second count charged that defendant inserted his penis into the victim's vagina. *Hill v. State*, 929 So. 2d 375 (Miss. Ct. App. 2006).

3. Indictment.

Defendant was properly convicted of sexually battery by digital penetration where sufficient proof showed that defendant was provided notice that he was being charged with sexual battery, and the variance between the language of the indictment and proof at trial was not a fatal error under Miss. Const. art. 3, § 26. *Burrows v. State*, 961 So. 2d 701 (Miss. 2007).

§ 97-3-101. Sexual battery; penalty.

JUDICIAL DECISIONS

2. Sentence ranges.

Defendant's life sentence after he was convicted of sexual battery of child under the age of 14 was appropriate because it was constitutional, Miss. Code Ann. § 97-3-101(3). Although there were certainly Mississippi cases where defendants were sentenced to less than life for the crime of sexual battery or other similar crimes, there were also numerous cases where life sentences were given for such crimes; the fact that other similarly situated defendants received lighter sentences did not prove that defendant's sentence was grossly disproportionate to the crime committed. *Carter v. State*, 996 So. 2d 112 (Miss. Ct. App. 2008), writ of certiorari

denied by 999 So. 2d 374, 2009 Miss. LEXIS 43 (Miss. 2009).

Defendant was convicted of four counts of sexual battery for repeatedly sexually battering defendant's stepdaughter during a time period when she was 11 years of age by forcing her to engage in sex acts and sexual intercourse with defendant, and defendant was sentenced to two consecutive life sentences (the statutory maximum) and two consecutive 20-year terms; defendant also stated that he took pictures of the victim and possessed child pornography, and in light of the evidence put forth supporting defendant's guilt, and the nature of the crime of which defendant was convicted, defendant's sen-

tences were not grossly disproportionate to the offenses or constitutionally violative. *Evans v. State*, 984 So. 2d 308 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 289 (Miss. 2008).

§ 97-3-104. Crime of sexual activity between certain individuals and offenders incarcerated in correctional facilities or on correctional supervision; sanctions.

(1) It is unlawful for any jailer, guard, employee of the Department of Corrections, sheriff, constable, marshal, other officer, or employee of a law enforcement agency or correctional facility to engage in any sexual penetration, as defined in Section 97-3-97, or other sexual act with any offender, with the offender's consent, who is incarcerated at any jail or any state, county or private correctional facility or who is serving on probation, parole, earned-release supervision, post-release supervision, earned probation, intensive supervision or any other form of correctional supervision.

(2) It is unlawful for any civilian with supervisory or custodial authority over an offender to engage in any sexual penetration, as defined in Section 97-3-97, or other sexual act with the offender, with the offender's consent, who is incarcerated at any jail or any state, county or private correctional facility.

(3) Any person who violates this section is guilty of a felony and upon conviction shall be fined not more than Five Thousand Dollars (\$5,000.00) or imprisoned for a term not to exceed five (5) years, or both.

SOURCES: Laws, 1998, ch. 470, § 1; Laws, 2004, ch. 589, § 1; Laws, 2005, ch. 518, § 1; Laws, 2010, ch. 369, § 1, eff from and after passage (approved Mar. 16, 2010.)

Amendment Notes — The 2010 amendment designated the former first and last sentences as (1) and (3), respectively, and added (2); and in (1), inserted “or employee of a law enforcement agency or correctional facility,” substituted “or other sexual act with” for “or have carnal knowledge with,” and inserted “intensive supervision.”

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

§ 97-3-107. Stalking; aggravated stalking; penalties; definitions.

(1)(a) Any person who purposefully engages in a course of conduct directed at a specific person, or who makes a credible threat, and who knows or should know that the conduct would cause a reasonable person to fear for his or her own safety, to fear for the safety of another person, or to fear damage or destruction of his or her property, is guilty of the crime of stalking.

(b) A person who is convicted of the crime of stalking under this section shall be punished by imprisonment in the county jail for not more than one (1) year or by a fine of not more than One Thousand Dollars (\$1,000.00), or by both such fine and imprisonment.

(c) Any person who is convicted of a violation of this section when there is in effect at the time of the commission of the offense a valid temporary restraining order, ex parte protective order, protective order after hearing, court approved consent agreement, or an injunction issued by a municipal, justice, county, circuit or chancery court, federal or tribal court or by a foreign court of competent jurisdiction prohibiting the behavior described in this section against the same party, shall be punished by imprisonment in the county jail for not more than one (1) year and by a fine of not more than One Thousand Five Hundred Dollars (\$1,500.00).

(2)(a) A person who commits acts that would constitute the crime of stalking as defined in this section is guilty of the crime of aggravated stalking if any of the following circumstances exist:

(i) At least one (1) of the actions constituting the offense involved the use or display of a deadly weapon with the intent to place the victim of the stalking in reasonable fear of death or great bodily injury to self or a third person;

(ii) Within the past seven (7) years, the perpetrator has been previously convicted of stalking or aggravated stalking under this section or a substantially similar law of another state, political subdivision of another state, of the United States, or of a federally recognized Indian tribe, whether against the same or another victim; or

(iii) At the time of the offense, the perpetrator was a person required to register as a sex offender pursuant to state, federal, military or tribal law and the victim was under the age of eighteen (18) years.

(b) Aggravated stalking is a felony punishable as follows:

(i) Except as provided in subparagraph (ii), by imprisonment in the custody of the Department of Corrections for not more than five (5) years and a fine of not more than Three Thousand Dollars (\$3,000.00).

(ii) If, at the time of the offense, the perpetrator was required to register as a sex offender pursuant to state, federal, military or tribal law, and the victim was under the age of eighteen (18) years, by imprisonment for not more than six (6) years in the custody of the Department of Corrections and a fine of Four Thousand Dollars (\$4,000.00).

(3) Upon conviction, the sentencing court shall consider issuance of an order prohibiting the perpetrator from any contact with the victim. The duration of any order prohibiting contact with the victim shall be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim or another person.

(4) Every conviction of stalking or aggravated stalking may require as a condition of any suspended sentence or sentence of probation that the defendant, at his own expense, submit to psychiatric or psychological counseling or other such treatment or behavioral modification program deemed appropriate by the court.

(5) In any prosecution under this section, it shall not be a defense that the perpetrator was not given actual notice that the course of conduct was unwanted or that the perpetrator did not intend to cause the victim fear.

(6) When investigating allegations of a violation of this section, law enforcement officers shall utilize the Uniform Offense Report prescribed by the Office of the Attorney General in consultation with the sheriffs' and police chiefs' associations. However, failure of law enforcement to utilize the Uniform Offense Report shall in no way invalidate the crime charged under this section.

(7) For purposes of venue, any violation of this section shall be considered to have been committed in any county in which any single act was performed in furtherance of a violation of this section. An electronic communication shall be deemed to have been committed in any county from which the electronic communication is generated or in which it is received.

(8) For the purposes of this section:

(a) "Course of conduct" means a pattern of conduct composed of a series of two (2) or more acts over a period of time, however short, evidencing a continuity of purpose and that would cause a reasonable person to fear for his or her own safety, to fear for the safety of another person, or to fear damage or destruction of his or her property. Such acts may include, but are not limited to, the following or any combination thereof, whether done directly or indirectly: (i) following or confronting the other person in a public place or on private property against the other person's will; (ii) contacting the other person by telephone or mail, or by electronic mail or communication as defined in Section 97-45-1; or (iii) threatening or causing harm to the other person or a third party.

(b) "Credible threat" means a verbal or written threat to cause harm to a specific person or to cause damage to property that would cause a reasonable person to fear for the safety of that person or damage to the property.

(c) "Reasonable person" means a reasonable person in the victim's circumstances.

(9) The incarceration of a person at the time the threat is made shall not be a bar to prosecution under this section. Constitutionally protected activity is not prohibited by this section.

SOURCES: Laws, 1992, ch. 532, § 1; Laws, 1996, ch. 326, § 1; Laws, 2000, ch. 553, § 1; Laws, 2006, ch. 583, § 1; Laws, 2010, ch. 453, § 1, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment rewrote the section to revise the elements of and terms of punishment for the offense of stalking and aggravated stalking.

JUDICIAL DECISIONS

1. In general.
2. Right of trial by jury.
3. Sufficiency of the evidence.

1. In general.

Because it was clear that for a violation of Miss. Code Ann. § 97-3-107(4) to occur

the offending conduct had to be intentional, and Miss. Code Ann. § 15-1-35 applied to all intentional torts that were substantially like those enumerated, stalking was subject to the one-year statute of limitations of § 15-1-35; because the employee did not file her complaint

within one year of last alleged action by her supervisor, it was time-barred. *Jones v. B.L. Dev. Corp.*, 940 So. 2d 961 (Miss. Ct. App. 2006).

2. Right of trial by jury.

Because the offense of stalking under Miss. Code Ann. § 97-3-107(1), with which defendant was being charged, was punishable by up to one year in jail, defendant had a right to a jury trial, a circuit court had no discretion to deny him that right and the circuit court erred in refusing defendant's request for a jury trial. *Ude v. State*, 992 So. 2d 1213 (Miss. Ct. App. 2008), remanded by 2012 Miss. App. LEXIS 189 (Miss. Ct. App. Apr. 3, 2012).

3. Sufficiency of the evidence.

Evidence, including that defendant repeatedly called the victim, visited her of-

fice, sent her gifts and food despite being told numerous times that he was not to have any contact with the victim; the victim's testimony that she confronted defendant about his behavior and told him that she did not wish to have any contact with him, that he became angry and violent, and that he yelled at her; and other testimony that defendant refused to obey numerous specific directives that he stay away from the victim, was sufficient evidence for a circuit court to have found defendant guilty of stalking. *Ude v. State*, 992 So. 2d 1213 (Miss. Ct. App. 2008), remanded by 2012 Miss. App. LEXIS 189 (Miss. Ct. App. Apr. 3, 2012).

§ 97-3-109. Drive-by shooting; drive-by bombing.

JUDICIAL DECISIONS

3. Essential elements.

In order to obtain a valid conviction of a defendant for felony murder while engaged in the crime of drive-by shooting, the State is required to prove all essential elements of both Miss. Code Ann. § 97-3-19(1)(c) and Miss. Code Ann. § 97-3-109(1). Thus, the State is required to

prove under Miss. Code Ann. § 97-3-109(1) that the defendant caused serious bodily injury to another purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life by discharging a firearm while in or on a vehicle. *Boyd v. State*, 977 So. 2d 329 (Miss. 2008).

§ 97-3-111. Forfeiture of vehicles used in drive-by shootings or bombings.

Editor's Note — Section 27-3-4 provides that the terms “ ‘Mississippi State Tax Commission,’ ‘State Tax Commission,’ ‘Tax Commission’ and ‘commission’ appearing in the laws of this state in connection with the performance of the duties and functions by the Mississippi State Tax Commission, the State Tax Commission or Tax Commission shall mean the Department of Revenue.”

§ 97-3-117. Mississippi Carjacking Act; what constitutes offense of carjacking; attempted carjacking; armed carjacking; penalties.

JUDICIAL DECISIONS

1. Evidence.
2. Indictment.
5. Sentence.

1. Evidence.

Evidence, though circumstantial, was sufficient to support defendant's conviction.

tion for carjacking, pursuant to Miss. Code Ann. § 97-3-117(1), because an investigator testified that defendant was implicated as being present at the scene on the morning of the attack; a photograph of defendant's mother was recovered from the vehicle after it was located in Texas, where defendant had relatives; and (3) a piece of paper with defendant's Social Security number written on it was found in the vehicle that was left at the scene. *Moses v. State*, 30 So. 3d 391 (Miss. Ct. App. 2010).

Trial court did not err by denying defendant's motion for a new trial because the state proved all of the elements of a carjacking; the legislature did not intend Miss. Code Ann. § 97-3-117 to be construed so literally as to mean that a person committed a carjacking only when an individual was physically inside the vehicle, and the evidence showed that the victim had just retrieved some money from the vehicle and had her keys in her hand when defendant approached her, defendant demanded the keys from her, snatched them out of her hand, and drove off. *Young v. State*, 962 So. 2d 110 (Miss. Ct. App. 2007).

Evidence was sufficient to convict defendant of armed carjacking where the victims, when presented with a photo lineup, picked out defendant and all three identified defendant in court as the black-shirted carjacker; the eyewitness testi-

mony was corroborated by defendant's conduct during the police chase. *Jackson v. State*, 969 So. 2d 124 (Miss. Ct. App. 2007).

2. Indictment.

In a carjacking case, even though an indictment and a jury instruction lacked the specific language "from another person's immediate actual possession," as set forth in Miss. Code Ann. § 97-3-117(1), they were sufficient because the use of the name of the victim was the equivalent of such. Therefore, there was no due process violation, and defense counsel was not ineffective for submitting the instruction to the jury. *Perryman v. State*, 16 So. 3d 41 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 404 (Miss. 2009).

5. Sentence.

Defendant's sentence to thirty years' incarceration, with ten years suspended, for armed carjacking was not excessive because the sentence was within statutorily prescribed limits. *Clark v. State*, 54 So. 3d 304 (Miss. Ct. App. 2011).

In a carjacking case, a trial court erred by imposing a 30-year sentence, even though defendant was a habitual offender, because this was in excess of the maximum sentence of 15 years for that crime. *Perryman v. State*, 16 So. 3d 41 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 404 (Miss. 2009).

RESEARCH REFERENCES

ALR. Cigarette Lighter as Deadly or Dangerous Weapon. 22 A.L.R. 6th 533.

CHAPTER 5

Offenses Affecting Children

SEC.

- 97-5-24. Sexual involvement of school employee with student; duty to report; penalties for failure to report; immunity from civil liability for report made in good faith.
- 97-5-33. Exploitation of children; prohibitions.
- 97-5-49. Knowingly allowing party where minor obtains, possesses or consumes alcoholic beverage; definitions; applicability of section; penalties.
- 97-5-51. Mandatory reporting of sex crimes against minors; definitions; procedure; report contents; forensic samples; penalties.

§ 97-5-23. Touching, handling, etc., child, mentally defective or incapacitated person or physically helpless person.

Cross References — Mandatory reporting of offense under this section relating to the touching of a child, mentally defective or incapacitate person or physically helpless person for lustful purposes when committed by an adult against a minor under the age of sixteen, see § 97-5-51.

JUDICIAL DECISIONS

2. Indictment.
3. Evidence.
4. Sentence.
6. Ineffective assistance of counsel.
7. Jury instructions.

2. Indictment.

Indictment charged defendant with one count of touching a child for lustful purposes pursuant to Miss. Code Ann. § 97-5-23(1) and one count of sexual battery pursuant to Miss. Code Ann. § 97-3-95(1)(d), and the crimes formed a common scheme of sexual misconduct and all the crimes occurred over a period of time against the same victim in a similar manner; thus, the court rejected defendant's claim that it was error for him to be tried on a multi-count indictment, for purposes of Miss. Code Ann. § 99-7-2, plus the court noted that the trial court instructed the jury to evaluate each count separately and return separate verdicts. *Wilson v. State*, 990 So. 2d 798 (Miss. Ct. App. 2008).

Indictment for fondling and sexual battery was not defective for failing to provide the specific dates that the offenses occurred, as the state had narrowed the time frame sufficiently to put defendant on notice of the nature and cause of the charges against him. *Hodgin v. State*, 964 So. 2d 492 (Miss. 2007).

3. Evidence.

Fact that the jury did not find defendant guilty of sexual battery did not vitiate the evidence as to touching; it simply meant that the jury was discerning and did not find sufficient evidence to support the sexual battery charges. *Dubose v. State*, 22 So. 3d 340 (Miss. Ct. App. 2009).

Sexual penetration is not required to prove an unlawful touching. *Dubose v. State*, 22 So. 3d 340 (Miss. Ct. App. 2009).

Verdict was not against the overwhelming weight of the evidence; all three children testified in graphic detail that defendant touched them. The children were removed from the home, and they were later taken to a pediatrician who testified that all three children had injuries consistent with their account of sexual abuse. *Dubose v. State*, 22 So. 3d 340 (Miss. Ct. App. 2009).

Defendant's conviction of sexual battery and child fondling was supported by sufficient evidence where the victim, defendant's stepdaughter, testified that defendant fondled her breasts and genitals, inserted a vibrator into her vagina, and attempted vaginal penetration with his penis when she was between the ages of nine and ten years old. Further, the victim's grandmother testified that the victim admitted that defendant was "touching her" and that she took the victim to a doctor specializing in gynecology for a physical, and the doctor testified that her examination of the victim revealed tears in her hymen, which were consistent with and evidence of trauma. *Tate v. State*, 20 So. 3d 623 (Miss. 2009).

Defendant was properly convicted of sexual battery in violation of Miss. Code Ann. § 97-3-95(d)(1) and unlawful touching of a child under the age of sixteen in violation of Miss. Code Ann. § 97-5-23 because his rights under the Double Jeopardy Clause were not violated when the record clearly evinced two separate acts of touching, and the State presented separate and independent proof of each charge; defendant sexually assaulted the victim in her living room when he committed statutory rape and sexually assaulted her again when he committed sexual battery by inserting his finger into her anus, and evidence was presented by numerous

witnesses that the victim consistently described a second act of touching at a different time and in a different location of the house. *Woods v. State*, 30 So. 3d 362 (Miss. Ct. App. 2009).

Court found a factual basis to establish the charges against an inmate for voyeurism under Miss. Code Ann. § 97-29-61 and touching a child for lustful purposes under Miss. Code Ann. § 97-5-23(1), given that (1) the inmate admitted the facts that surrounded the elements for both of the crimes, (2) the inmate's daughter reported the same story to her grandmother and others, and (3) the daughter provided sufficient facts and detail to support the charges. *Gaddy v. State*, 21 So. 3d 677 (Miss. Ct. App. 2009), writ of certiorari denied by 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (U.S. 2010).

Evidence was sufficient to convict defendant of fondling, although defendant argued that if he touched the victim at all on the breasts, the touching was accidental; the circumstances of the case were sufficient for a reasonable jury to infer that defendant's intent in touching the victim was to satisfy his lustful desires. *Wright v. State*, 9 So. 3d 447 (Miss. Ct. App. 2009).

There was no factual basis for defendant's guilty plea to touching a child for lustful purposes; while defendant admitted to positioning a blanket that was covering the child and taking pictures of the child's clothed buttocks while the child slept, defendant only touched the blanket. *Carreiro v. State*, 5 So. 3d 1170 (Miss. Ct. App. 2009).

Denial of defendant's motion for a new trial after he was convicted of statutory rape and unlawful touching of a child for lustful purposes, in violation of Miss. Code Ann. §§ 97-3-65(1)(b) and 97-5-23(1), was appropriate because defendant's argument on appeal raised the same points that were part of his trial defense. Defendant also failed to point to anything in the record negating the State's evidence. *Parramore v. State*, 5 So. 3d 1074 (Miss. 2009).

Trial court did not err in denying defendant's motion for a new trial because the evidence supported defendant's convictions for touching a child for lustful pur-

poses, in violation of Miss. Code Ann. § 97-5-23(1), and kidnapping; the victim testified as to what transpired and identified both defendant and defendant's vehicle. *Nix v. State*, 8 So. 3d 141 (Miss. 2009).

Where the fourteen-year-old victim testified that she was visiting her grandparent's house when defendant inappropriately touched her, the evidence was sufficient to support the jury's verdict convicting defendant of lustful touching of a child pursuant to Miss. Code Ann. § 97-5-23; the victim never returned to her grandparent's home after the alleged incident occurred. While the victim delayed three weeks in reporting the alleged incident, her actions were consistent with the conduct of a person victimized by a sex crime; therefore, the trial court did not err by denying defendant's motion for a judgment notwithstanding the verdict. *Massey v. State*, 992 So. 2d 1161 (Miss. 2008).

Jury was faced with the victim's account of the crime versus defendant's denial and weighing the evidence in the light most favorable to the verdict, the court could not find that allowing defendant's conviction under Miss. Code Ann. §§ 97-5-23(1), 97-3-95(1)(d) to stand would sanction an unconscionable injustice. *Wilson v. State*, 990 So. 2d 798 (Miss. Ct. App. 2008).

There was testimony from the victim that defendant had an erection during one of the encounters and thus a rational juror could have found that defendant's actions were lustful, for purposes of his fondling conviction under Miss. Code Ann. § 97-5-23(1). *Wilson v. State*, 990 So. 2d 798 (Miss. Ct. App. 2008).

Evidence was sufficient to convict a defendant of fondling, notwithstanding the defendant's contention that there was no physical evidence, because the victim testified that she was fondled by the defendant and a witness testified that she saw the defendant fondling the victim. *Miller v. State*, 982 So. 2d 995 (Miss. Ct. App. 2008).

Defendant's conviction for fondling was appropriate based on the victim's testimony that defendant touched or poked her "private area" and based on a detective's testimony that defendant made several incriminating statements during an inter-

view with the detective. In part, the detective testified that defendant acknowledged that he was just trying to see if he could get away with touching the victim. *Richardson v. State*, 990 So. 2d 247 (Miss. Ct. App. 2008).

Defendant's conviction for fondling his seven-year-old daughter was appropriate, in part because the jury heard the child's testimony that defendant performed a sexual act on her while she was playing on the computer. Any inconsistencies or contradictions in her testimony were obviously resolved by the jury in favor of the state. *Golden v. State*, 984 So. 2d 1026 (Miss. Ct. App. 2008).

While defendant was spending the evening at the house, the eleven-year-old victim testified that someone came into her bedroom and rubbed her breasts and buttocks and rubbed his penis against her legs, with his legs wrapped around her; the victim's sister testified that she saw defendant in the bedroom. The evidence was sufficient to support defendant's conviction for gratification of lust with a child under the age of sixteen in violation of Miss. Code Ann. § 97-5-23(1). *Boone v. State*, 973 So. 2d 237 (Miss. 2008).

Defendant's conviction for fondling a child under the age of 18 was appropriate because the evidence was sufficient. The jury had before it defendant's confession and the victim's testimony regarding the events and the fondling. *Pool v. Pool*, 989 So. 2d 920 (Miss. Ct. App. 2008), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 383 (Miss. 2008).

State adequately proved that defendant intended to gratify his lust when he molested the victim because the evidence indicated that defendant put his hand down the victim's shirt and touched her bare breast, and the victim testified that she tried to get away from defendant but that he restrained her. Under such circumstances, the jury was permitted to draw a reasonable inference that defendant had an improper purpose in mind; touching of this fashion went beyond innocent "prankish" touching or affectionate behavior. *Foxworth v. State*, 982 So. 2d 453 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 241 (Miss. 2008).

Sufficient evidence supported defendant's conviction for two counts of gratification of lust, a violation of Miss. Code Ann. § 97-5-23(2), because the victim, defendant's daughter, testified that defendant inserted his finger into her vagina and rubbed his hands under both her swimsuit top and bottom, while witnesses at the scene saw defendant place his hands under the victim's swimsuit and rub her in inappropriate places, and the intent to gratify his lust could easily be inferred from defendant's actions. *McDonald v. State*, 976 So. 2d 942 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 343, 2008 Miss. LEXIS 96 (Miss. 2008), writ of certiorari denied by 555 U.S. 846, 129 S. Ct. 90, 172 L. Ed. 2d 77, 2008 U.S. LEXIS 7290, 77 U.S.L.W. 3199 (2008).

Trial court did not err by not allowing defendant to introduce evidence concerning the circumstances of his divorce and custody battle with his daughter's mother because he produced no evidence, other than his assertions, that his ex-wife was involved in the actions leading up to defendant's conviction for molesting his daughter under Miss. Code Ann. § 97-5-23(2); the ex-wife was not a witness to the incident nor was she involved in bringing charges against defendant, and a close mother-daughter relationship was not sufficient evidence to show that either the ex-wife instructed her daughter to inform the authorities of the molestation or that the daughter fabricated the charge on her own. *McDonald v. State*, 976 So. 2d 942 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 343, 2008 Miss. LEXIS 96 (Miss. 2008), writ of certiorari denied by 555 U.S. 846, 129 S. Ct. 90, 172 L. Ed. 2d 77, 2008 U.S. LEXIS 7290, 77 U.S.L.W. 3199 (2008).

Evidence was sufficient to convict defendant of fondling of a child where there was ample evidence to support the jury's verdict; the jury heard the victim's testimony in which she described the various inappropriate ways defendant touched her, and the jury also heard defendant's recorded phone conversations with the victim. *Williams v. State*, 970 So. 2d 727 (Miss. Ct. App. 2007).

At trial for fondling and sexual battery, it was not error under the circumstances

presented to accept a witness as an expert in the field of child abuse, allow an unredacted videotape of the child victim's interview to be admitted into evidence, or to allow the victim's mother to testify as to statements that the victim made to her. *Hodgin v. State*, 964 So. 2d 492 (Miss. 2007).

Although defendant alleged that he was not allowed to demonstrate bias or prejudice, the trial court did not abuse its discretion in determining that the mother's motive of money was a collateral matter that would not help the jury decide whether the statutory rape or fondling occurred; thus, pursuant to Miss. R. Evid. 103(a), the trial court did not err in excluding that evidence. *Poynor v. State*, 962 So. 2d 68 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 416 (Miss. 2007).

Directed verdict was properly denied for a conviction under Miss. Code Ann. § 97-5-23(1) because a child testified that defendant rubbed his bare behind in a vehicle, and despite the fact that no baby oil was found on his body, the child testified that defendant had masturbated with the baby oil; it did not matter that the victim did not inform people of the incident when defendant made several stops. *Potts v. State*, 955 So. 2d 913 (Miss. Ct. App. 2007).

Trial court did not err by denying defendant's motion for judgment notwithstanding the verdict because there was sufficient evidence to convict defendant of both sexual battery and fondling; the victim testified that, inter alia: (1) defendant licked her everywhere, including between her legs and her chest; (2) defendant penetrated the victim's vagina with his tongue; (3) defendant pulled off the victim's panties in order to fondle and lick her; (4) defendant pulled up her shirt to lick her chest; (5) defendant tried to insert his thumb inside the victim; (6) and the victim was 13 years old at the time, and defendant was her stepfather. *Ivy v. State*, 949 So. 2d 748 (Miss. 2007).

Trial court did not err by denying defendant's motion for a new trial because the evidence weighed in the light most favorable to the verdict supported the jury's resolution of the conflicting testimony; the

evidence presented in defendant's trial for sexual battery and fondling included: (1) the victim's testimony in graphic detail as to the licking and touching that she endured from defendant; (2) defendant exercised his right to testify and testified that he did nothing wrong to the victim, his stepdaughter, but that the victim just wanted him out of the house; and (3) an investigator testified regarding what defendant stated in his written statement as well as statements defendant made that he did not want in the written statement. *Ivy v. State*, 949 So. 2d 748 (Miss. 2007).

Where a doctor who examined the victim testified that the victim's rectum was swollen and there was a tear on the opening into the rectum, and he stated that those injuries were consistent with sexual battery, the evidence clearly indicated that the victim was sexually penetrated pursuant to the sexual battery statute, Miss. Code Ann. § 97-3-95(1)(d); with regard to the statement by the victim's grandmother that the victim had told lies before, the evidence did not rise to the level of conflicting evidence warranting a lustful touching jury instruction, and thus the trial court did not err in denying the jury instruction on the lesser-included offense of lustful touching. *Divine v. State*, 947 So. 2d 1017 (Miss. Ct. App. 2007).

Defendant was not entitled to reversal of his conviction for fondling a child in violation of Miss. Code Ann. § 97-5-23 because, inter alia: (1) the evidence was sufficient to enable a reasonable juror to find defendant guilty beyond a reasonable doubt, (2) the trial court did not improperly limit cross-examination of the victim in violation of defendant's rights under USCS Const. Amend. 6 and Miss. Const. Art. III, § 26, because testimony concerning the victim's past sexual behavior was properly excluded under Miss. R. Evid. 412; (3) since defendant failed to object at trial to the qualification of an expert witness under Miss. R. Evid. 702, the issue was waived; and (4) under Miss. R. Evid. 615(3), the expert witness was properly allowed to remain in the court room so that she could base her opinion on facts learned at the trial pursuant to Miss. R. Evid. 703. *Aguilar v. State*, 955 So. 2d 386 (Miss. Ct. App. 2006).

Evidence was sufficient to convict defendant of fondling the 15-year-old victim under Miss. Code Ann. § 97-5-23 because: (1) the state offered direct evidence in the form of the victim's testimony and defendant's statement to the police; and (2) recognition that defendant touched the victim to satisfy his lustful desires could arise from the circumstances of the encounter. *Mingo v. State*, 944 So. 2d 18 (Miss. 2006).

Insured, an agent, and two owners were not entitled to coverage under a commercial general liability policy with regard to lawsuits filed against them, which alleged that the insured, the agent, and the owners acted negligently by allowing an officer to sexually molest certain females, as the policy contained an exclusion for injuries that arose out of a willful violation of a penal statute, and the officer's alleged sexual misconduct violated Miss. Code Ann. § 97-5-23. *Md. Cas. Co. v. Lab Disc. Drug, Inc.*, 468 F. Supp. 2d 862 (S.D. Miss. 2006).

Defendant's conviction for two counts of child fondling, in violation of Miss. Code Ann. § 97-5-23(2), was supported by substantial evidence where defendant's 13- and 14-year-old daughters testified that he rubbed his penis on their thighs; one daughter also testified that defendant eventually ejaculated on her. *Boykin v. State*, 941 So. 2d 892 (Miss. Ct. App. 2006).

Defendant's conviction for fondling was appropriate because the fact that the victim's father was in prison for child molestation was not relevant evidence under Miss. R. Evid. 401 since the evidence regarding the victim's father did not affect the credibility of the victim and she had not seen her father in over four years; thus, the father was not responsible for committing the crime, contrary to defendant's suggestion. *Higdon v. State*, 938 So. 2d 340 (Miss. Ct. App. 2006).

4. Sentence.

Terms of an inmate's sentences were within the statutory limits of Miss. Code Ann. §§ 97-29-61, 97-5-23(1) and thus the claim that the trial court erred in sentencing the inmate to maximum sentences was without merit. *Gaddy v. State*, 21 So. 3d 677 (Miss. Ct. App. 2009), writ of cer-

tiorari denied by 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (U.S. 2010).

Denial of appellant's, an inmate's, motion for postconviction relief was appropriate because his sentence was within the prescribed limits of Miss. Code Ann. § 97-5-23 and it did not exceed the maximum term allowed by statute. *Bowling v. State*, 12 So. 3d 607 (Miss. Ct. App. 2009).

In a case where defendant was convicted of three counts of fondling the 15-year-old victim under Miss. Code Ann. § 97-5-23, defendant's three 10-year consecutive sentences under Miss. Code Ann. § 99-19-21 were not disproportionate to defendant's crimes, were within the limits set by statute, and did not violate the Eighth Amendment. *Mingo v. State*, 944 So. 2d 18 (Miss. 2006).

6. Ineffective assistance of counsel.

Denial of post-conviction relief was proper as the sentence imposed was within the statutory mandate, the petitioner failed to claim his guilty plea to touching a child for lustful purposes under Miss. Code Ann. § 97-5-23(1) was not freely, voluntarily, and intelligently given, and he did not request a reversal of his guilty plea due to his trial counsel's alleged ineffective assistance. *Lewis v. State*, 988 So. 2d 942 (Miss. Ct. App. 2008).

7. Jury instructions.

In a case in which defendant appealed his conviction for fondling a child under the age of 16, in violation of Miss. Code Ann. § 97-5-23, he argued unsuccessfully that he was denied a fair trial because jury instruction number five impermissibly shifted the burden of proof from the State to him, thereby requiring him to prove his innocence. Jury instruction number five did not impermissibly shift the burden of proof to defendant, and when that instruction was considered in combination with instructions seven and eight, his presumption of innocence and the State's burden of proof were fairly and accurately announced and any potential for juror confusion was removed. *Johnson v. State*, 19 So. 3d 145 (Miss. Ct. App. 2009).

§ 97-5-24. Sexual involvement of school employee with student; duty to report; penalties for failure to report; immunity from civil liability for report made in good faith.

If any person eighteen (18) years or older who is employed by any public school district or private school in this state is accused of fondling or having any type of sexual involvement with any child under the age of eighteen (18) years who is enrolled in such school, the principal of such school and the superintendent of such school district shall timely notify the district attorney with jurisdiction where the school is located of such accusation, the Mississippi Department of Education and the Department of Human Services, provided that such accusation is reported to the principal and to the school superintendent and that there is a reasonable basis to believe that such accusation is true. Any superintendent, or his designee, who fails to make a report required by this section shall be subject to the penalties provided in Section 37-11-35. Any superintendent, principal, teacher or other school personnel participating in the making of a required report pursuant to this section or participating in any judicial proceeding resulting therefrom shall be presumed to be acting in good faith. Any person reporting in good faith shall be immune from any civil liability that might otherwise be incurred or imposed.

SOURCES: Laws, 1994, ch. 595, § 11; Laws, 2011, ch. 514, § 2, eff from and after passage (approved Apr. 26, 2011.)

Amendment Notes — The 2011 amendment rewrote the section.

JUDICIAL DECISIONS

1. Duty not triggered.
2. Applicable standard.

1. Duty not triggered.

Judgment was properly entered for a school district in a case alleging negligence per se and other causes of action because an unsubstantiated rumor of an inappropriate relationship between a teacher and a student, without more, was insufficient to trigger a reporting duty under Miss. Code Ann. § 97-5-24; Miss. Code Ann. § 43-21-353 did not apply since the teacher was not a person responsible for the student's care or support, and there was no evidence that the type of conduct applicable to § 43-21-353 had oc-

curred. *Brown v. Pontotoc County Sch. Dist. (In re Doe)*, 957 So. 2d 410 (Miss. Ct. App. 2007).

2. Applicable standard.

Standard enunciated in *T.M. v. Noblitt*, 650 So. 2d 1340 (Miss. 1995), was applied to a case where a school district did not report a relationship between a teacher and a student; under the "personal judgment and discretion" standard, a trial court did not err in determining that the district did not know of the relationship between them based on one unsubstantiated rumor. *Brown v. Pontotoc County Sch. Dist. (In re Doe)*, 957 So. 2d 410 (Miss. Ct. App. 2007).

§ 97-5-31. Exploitation of children; definitions.**JUDICIAL DECISIONS**

1. Evidence.
2. "Sexually explicit conduct."

1. Evidence.

Jury was justified in its finding that the images it viewed depicted "sexually explicit conduct" because one tape showed numerous close-ups of only the genitals of young boys, which was the only focal point; another tape also showed children's genitals in almost every depiction and from numerous angles. *Hood v. State*, 17 So. 3d 548 (Miss. 2009).

2. "Sexually explicit conduct."

On review of defendant's conviction of the exploitation of children based upon his

possession of a videotape depicting nude male children and showing closeups of their genitals, the court rejected defendant's argument that his conviction could not stand because the children were not engaged in sexually explicit conduct and held that the jury properly concluded that the children were engaged in sexually explicit behavior because the depictions were designed to elicit a sexual response in the viewer. *Hood v. State*, — So. 3d —, 2009 Miss. LEXIS 364 (Miss. July 30, 2009).

§ 97-5-33. Exploitation of children; prohibitions.

(1) No person shall, by any means including computer, cause, solicit or knowingly permit any child to engage in sexually explicit conduct or in the simulation of sexually explicit conduct for the purpose of producing any visual depiction of such conduct.

(2) No person shall, by any means including computer, photograph, film, video tape or otherwise depict or record a child engaging in sexually explicit conduct or in the simulation of sexually explicit conduct.

(3) No person shall, by any means including computer, knowingly send, transport, transmit, ship, mail or receive any photograph, drawing, sketch, film, video tape or other visual depiction of an actual child engaging in sexually explicit conduct.

(4) No person shall, by any means including computer, receive with intent to distribute, distribute for sale, sell or attempt to sell in any manner any photograph, drawing, sketch, film, video tape or other visual depiction of an actual child engaging in sexually explicit conduct.

(5) No person shall, by any means including computer, possess any photograph, drawing, sketch, film, video tape or other visual depiction of an actual child engaging in sexually explicit conduct.

(6) No person shall, by any means including computer, knowingly entice, induce, persuade, seduce, solicit, advise, coerce, or order a child to meet with the defendant or any other person for the purpose of engaging in sexually explicit conduct.

(7) No person shall by any means, including computer, knowingly entice, induce, persuade, seduce, solicit, advise, coerce or order a child to produce any visual depiction of adult sexual conduct or any sexually explicit conduct.

(8) The fact that an undercover operative or law enforcement officer posed as a child or was involved in any other manner in the detection and

investigation of an offense under this section shall not constitute a defense to a prosecution under this section.

(9) For purposes of determining jurisdiction, the offense is committed in this state if all or part of the conduct described in this section occurs in the State of Mississippi or if the transmission that constitutes the offense either originates in this state or is received in this state.

SOURCES: Laws, 1979, ch. 479, § 2; Laws, 1988, ch. 558; Laws, 1995, ch. 484, § 2; Laws, 2003, ch. 562, § 2; Laws, 2005, ch. 467, § 1; Laws, 2005, ch. 491, § 1; Laws, 2007, ch. 376, § 1, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment in (8), inserted “posed as a child or” preceding “was involved” and “in any other manner” thereafter.

Cross References — Mandatory reporting of offense under this section relating to exploitation of children when committed by an adult against a minor under the age of sixteen, see § 97-5-51.

JUDICIAL DECISIONS

3. Closing arguments.
5. Evidence.
6. Jury instructions.
7. Mens rea.

3. Closing arguments.

In a case in which defendant was convicted of enticing a child for sexual purposes, defense counsel’s discontinuance of his reasonable doubt argument was not trial court error but rather a choice on the part of defense counsel; even assuming that the trial court impermissibly prohibited defense counsel’s reasonable doubt argument, the error was harmless because of the overwhelming evidence of defendant’s guilt. *Delashmit v. State*, 991 So. 2d 1215 (Miss. 2008).

5. Evidence.

Defendant’s conviction for the possession of child pornography in violation of Miss. Code Ann. § 97-5-33(5) was appropriate because there was no evidence that any of the computer viruses or other programs that defendant’s computer expert described as being on defendant’s computer actually transferred any of the images of child pornography. Further, that expert’s testimony was in stark contrast to other testimony stating that viruses or “Trojan” programs were not responsible for placing the pornographic images of children onto defendant’s computer. *Renfrow v. State*, 34 So. 3d 617 (Miss. Ct. App.

2009), writ of certiorari dismissed by 31 So. 3d 1217, 2010 Miss. LEXIS 213 (Miss. 2010).

On review of defendant’s conviction of the exploitation of children based upon his possession of a videotape depicting nude male children and showing closeups of their genitals, the court rejected defendant’s argument that his conviction could not stand because the children were not engaged in sexually explicit conduct and held that the jury properly concluded that the children were engaged in sexually explicit behavior because the depictions were designed to elicit a sexual response in the viewer. *Hood v. State*, — So. 3d —, 2009 Miss. LEXIS 364 (Miss. July 30, 2009).

Where defendant testified that he received images of child pornography via an email, admitted that he created a folder in his computer, and placed fourteen images in that folder, there was direct evidence that he possessed child pornography; he was not entitled to a jury instruction on circumstantial evidence. The evidence was sufficient to support his conviction for fourteen counts of the exploitation of children in violation of Miss. Code Ann. § 97-5-33(5). *Argo v. State*, 13 So. 3d 849 (Miss. Ct. App. 2009).

There was no factual basis for defendant’s guilty plea to exploitation of a child under Miss. Code Ann. § 97-5-33(2); while

defendant admitted to positioning a blanket that was covering the child and taking pictures of the child's clothed buttocks while the child slept, the child did not engage in lascivious conduct. *Carreiro v. State*, 5 So. 3d 1170 (Miss. Ct. App. 2009).

6. Jury instructions.

In a case in which defendant was convicted of enticing a child for sexual purposes, defendant was not entitled to a lesser included offense instruction on misdemeanor indecent exposure; based on the overwhelming evidence, no reasonable jury could have found defendant not guilty of any element of the principal charge. *Delashmit v. State*, 991 So. 2d 1215 (Miss. 2008).

7. Mens rea.

Defendant's conviction for the possession of child pornography was appropriate because the State charged him with willful possession of child pornography and the indictment contained language that included an allegation that defendant willfully possessed child pornography; by including that language, the State imposed a mens rea requirement, and it was obligated to prove that aspect of the charge beyond a reasonable doubt. Consequently, it was irrelevant that Miss. Code Ann. § 97-5-33(5) did not include a mens rea element. *Renfrow v. State*, 34 So. 3d 617 (Miss. Ct. App. 2009), writ of certiorari dismissed by 31 So. 3d 1217, 2010 Miss. LEXIS 213 (Miss. 2010).

§ 97-5-35. Exploitation of children; penalties.

Cross References — Imposition and collection of separate laboratory analysis fee in addition to any other assessments and costs imposed by statute on every individual convicted of a felony in a case where Crime Laboratory provided forensic science or laboratory services in connection with the case, see § 45-1-29.

§ 97-5-39. Contributing to the neglect or delinquency of a child; felonious abuse and/or battery of a child.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1. In general.
4. Evidence.
6. Sentence and punishment.
7. Jury instructions.
8. Capital murder.

I. UNDER CURRENT LAW.

1. In general.

Jurisprudence allows an accused to assert a defense theory based upon a mistake-of-fact defense for the offense of felony child deprivation, pursuant to Miss. Code Ann. § 97-5-39(1)(b), if reasonably raised by the evidence. *Lenard v. State*, 51 So. 3d 239 (Miss. Ct. App. 2011).

To prove the offense of felony child deprivation, pursuant to Miss. Code Ann. § 97-5-39(1)(b), the State must prove that the acts or omissions were negligent or intentional. Therefore, this offense does

not constitute strict liability. *Lenard v. State*, 51 So. 3d 239 (Miss. Ct. App. 2011).

4. Evidence.

There was sufficient evidence for the jury to find that defendant inflicted serious bodily harm on a child under Miss. Code Ann. § 97-5-39(2)(a), as the physician who examined the child testified that only multiple blows using great force could have caused the child's injuries. *Baker v. State*, 70 So. 3d 235 (Miss. Ct. App. 2011), writ of certiorari denied en banc by 69 So. 3d 767, 2011 Miss. LEXIS 445 (Miss. 2011).

Trial court did not err in denying defendant's motion for a new trial because the jury was properly instructed on circumstantial evidence, and its verdict was supported by the overwhelming weight of the evidence; two doctors testified that the child's injury could have only been caused by a high-energy impact and that defen-

dant's explanations of how the injuries occurred were not plausible, and one of the doctors testified that he saw multiple red flags indicating child abuse. *Rutland v. State*, 60 So. 3d 187 (Miss. Ct. App. 2010), affirmed by 60 So. 3d 137, 2011 Miss. LEXIS 152 (Miss. 2011).

Trial court did not err in failing to grant defendant's motion for a judgment notwithstanding the verdict because any rational juror could have found beyond a reasonable doubt that all of the elements of felonious child abuse were proven by the State when the evidence presented was sufficient to show, to the exclusion of every other reasonable hypothesis, that defendant's actions resulted in the child's injuries; two doctors testified that the possible scenarios defendant gave for the child's injuries were not plausible, and defendant, who maintained that the child was constantly under her supervision, offered no other plausible explanation for the injuries. *Rutland v. State*, 60 So. 3d 187 (Miss. Ct. App. 2010), affirmed by 60 So. 3d 137, 2011 Miss. LEXIS 152 (Miss. 2011).

Defendant's conviction for felony child abuse in violation of Miss. Code Ann. § 97-5-39(2)(a) was appropriate because the evidence was sufficient. In part, medical testimony at trial unequivocally proved that the victim's severe bruising was a temporary disfigurement of a bodily organ. *Henry v. State*, 40 So. 3d 621 (Miss. Ct. App. 2010).

Evidence was sufficient to support the conviction for felonious child abuse, where there was ample evidence to show that the child suffered serious bodily injury, and the doctors who treated the child testified that he had sustained injuries that were life-threatening which he could not have caused to himself. *Hill v. State*, 40 So. 3d 591 (Miss. Ct. App. 2009).

Defendant's claims of the cause of the child's burns were inconsistent with medical evidence; thus, considering the evidence in light most favorable to the State, there was sufficient evidence from which the jury could have reasonably inferred that defendant intentionally held the child down in scalding water. *Anthony v. State*, 23 So. 3d 611 (Miss. Ct. App. 2009).

Reasonable, fair-minded jurors could have concluded that defendant was guilty

of felony child abuse, given that (1) he admitted in a handwritten statement that he had shaken the child, (2) there was testimony from two doctors that the child's injuries could not have been caused by a fall from a bouncy seat, (3) one doctor stated that the child's injuries were exclusively caused by a severe shake with the impact of her head hitting a surface, and (4) defendant admitted that he was the only adult present when the child's seat supposedly overturned. *German v. State*, 30 So. 3d 348 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

In defendant's felony child abuse case under Miss. Code Ann. § 97-5-39(2)(a), counsel was attempting to prevent the jury from hearing any more testimony about the lingering effects of the child's injuries by stipulating as to the child's condition; the court could not find this action deficient. *German v. State*, 30 So. 3d 348 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

Circumstantial evidence was sufficient to support defendant's conviction of felony child abuse where both doctors who treated defendant's nine-week-old son after he was admitted for emergency medical care testified that the child's injuries could not have been self-inflicted, that the injuries could only have been caused by a significant amount of force or trauma, and that the injuries were very recent, where defendant and his wife testified that defendant was the child's sole caretaker during the day while defendant's wife was working and that there was no evidence anyone else cared for the child, and where defendant's neighbor testified that he heard a male voice, inferably defendant's, shout "shut up," a slapping sound, and the sound of a child crying emanating from defendant's apartment. The combination of this evidence could easily lead a reasonable juror to conclude that defendant abused his nine-week-old son. *Hill v. State*, 17 So. 3d 1092 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 458 (Miss. 2009).

Evidence was sufficient to convict defendant of felony child abuse, Miss. Code Ann. § 97-5-39(2), where defendant was

in the trailer at all times during which the abuse might have happened, he encountered the victim before her injuries were discovered, and the victim identified defendant as her attacker. *Kazery v. State*, 995 So. 2d 827 (Miss. Ct. App. 2008).

Trial court did not err by denying defendant's motion for a new trial or for a judgment notwithstanding the verdict following his conviction of felony child abuse because several competent expert witnesses, some of whom treated the victim, testified regarding the victim's injuries and several lay witnesses, including defendant's aunt, family members, and a neighbor, testified as to what they observed on the day the victim suffered his injuries, including hearing a baby crying, a loud thump, and no more crying. *Middleton v. State*, 980 So. 2d 351 (Miss. Ct. App. 2008).

Defendant's conviction for felony child abuse based on the State's contention that defendant punished his girlfriend's child for a potty-training accident by holding her in scalding water until her feet were burned was not against the overwhelming weight of the evidence where, upon asking the child what happened, the child said that "Daddy did this." An expert in the field of emergency medicine and pediatrics, with special training in child abuse, opined that the child was forcibly placed in the water and held there. *Martin v. State*, 970 So. 2d 723 (Miss. 2007).

Facts supported defendant's conviction for capital murder as a result of felonious abuse of a child under Miss. Code Ann. § 97-3-19(2)(f) because failure to provide medical treatment to a child with severe injuries could be interpreted as intentional; defendant's omission in failing to at least bring the child for whom defendant was caring to a hospital to treat extensive and serious injuries was sufficient to find felonious child abuse. *Berry v. State*, 980 So. 2d 936 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 204 (Miss. 2008).

6. Sentence and punishment.

Defendant's conviction for felony child abuse was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, defendant's

claims that his attorney incorrectly informed him that the maximum penalty for felony child abuse was 20 years instead of the correct maximum sentence, which was life in prison, was without merit; the statement made to the jury during voir dire did not say that 20 years was the maximum penalty for felony child abuse but instead merely suggested to the jury the possibility that defendant could go to prison for 20 years, which was a valid possibility under Miss. Code Ann. § 97-5-39(2)(a). *Henry v. State*, 40 So. 3d 621 (Miss. Ct. App. 2010).

Defendant who was sentenced to 15 years for felony child abuse did not meet her burden to prove that she was entitled to post-conviction relief because: (1) no reason was presented why the mitigating evidence attached to her motion could not have been discovered previously, and (2) her sentence was within the statutory limits. *Austin v. State*, 971 So. 2d 1286 (Miss. Ct. App. 2008).

Inmate's claim that when reading Miss. Code Ann. § 97-5-39(2)(c) in conjunction with Miss. Code Ann. § 97-3-19(2)(f), the result was an automatic implication of a capital crime regardless of how or in what manner the child suffered death, was procedurally barred under Miss. Code Ann. § 99-39-21(1) because it could have been raised on direct appeal and was not; the claim was also without merit because the Mississippi Supreme Court had previously found that upon reading the statutes in conjunction they were constitutional. *Browner v. State*, 947 So. 2d 254 (Miss. 2006), dismissed by 2010 U.S. Dist. LEXIS 7487 (N.D. Miss. Jan. 27, 2010).

7. Jury instructions.

Defendant's convictions for felonious child abuse were appropriate, in part because, while comments made by the trial court might have been improper, the trial court gave a curative instruction stating that the comments had not been intended as commentary on the believability of the victim's testimony and requiring the jury to disregard the comments. *Clark v. State*, 40 So. 3d 531 (Miss. 2010).

Defendant's convictions for felonious child abuse were appropriate, in part because, while comments made by the trial court might have been improper, the trial

court gave a curative instruction stating that the comments had not been intended as commentary on the believability of the victim's testimony and requiring the jury to disregard the comments. *Clark v. State*, 40 So. 3d 531 (Miss. 2010).

In defendant's trial under Miss. Code Ann. § 97-5-39(2)(a), defendant did admit to shaking the child and his admission to an important element of the crime negated the need for a circumstantial-evidence instruction, such that counsel was not ineffective for failing to proffer such an instruction. *German v. State*, 30 So. 3d 348 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

Jury instruction defining child abuse as "intentional torture in such a manner as to cause serious bodily injury or the death of any child" was proper because it tracked the language of Miss. Code Ann. § 97-5-39(2)(a), and the language of the statute was not vague. *Rubenstein v. State*, 941 So. 2d 735 (Miss. 2006).

8. Capital murder.

Petitioner state death row inmate's argument that the charge of murder for each

victim was enhanced by underlying offenses that used murder as an element, thus violating the Double Jeopardy Clause of the Fifth Amendment, was rejected because Miss. Code Ann. § 97-3-19(1), described murder to include killing with deliberate design to effect the death of the person killed, and in Miss. Code Ann. § 97-3-19(2)(e) defined capital murder as including such a killing when done without any design to effect death by any person engaged in the commission of the crime of felonious child abuse and/or battery of a child in violation Miss. Code Ann. § 97-5-39(2) and child abuse, as had been alleged in the indictment, was not so much an "underlying felony" as an element of the offense of capital murder, thus, the merger doctrine did not really apply. *Stevens v. Epps*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), affirmed by 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

ATTORNEY GENERAL OPINIONS

A municipal court has jurisdiction to hear and decide, without a jury, an alleged violation of Miss. Code Ann. § 97-5-39(1)(a), and to punish offenders as prescribed by law. The penalty for state misdemeanors tried in a municipal court is

limited to six months incarceration and/or a \$1,000 fine pursuant to Miss Code Ann. § 21-13-19. *Boutwell*, March 16, 2007, A.G. Op. #07-00124, 2007 Miss. AG LEXIS 113.

§ 97-5-41. Carnal knowledge of step or adopted child; carnal knowledge of child by cohabitating partner.

Cross References — Mandatory reporting of offense under this section relating to the carnal knowledge of a stepchild, adopted child or child of a cohabitating partner when committed by an adult against a minor under the age of sixteen, see § 97-5-51.

§ 97-5-49. Knowingly allowing party where minor obtains, possesses or consumes alcoholic beverage; definitions; applicability of section; penalties.

(1) As used in this section:

- (a) "Adult" means a person over the age of twenty-one (21) years.
- (b) "Alcoholic beverage" has the meaning as defined in Section 67-1-5.
- (c) "Beer" has the meaning as defined in Section 67-3-3.

(d) “Light wine” means wine containing five percent (5%) or less of alcohol by weight.

(e) “Minor” means a person under the age of twenty-one (21) years.

(f) “Party” means a gathering or event at which a group of two (2) or more persons assembles for a social occasion or activity at a private residence or a private premises.

(g) “Private premises” means privately owned land, including any appurtenances or improvements on the land.

(h) “Private residence” means the place where a person actually lives or has his or her home.

(i) “Wine” has the meaning as defined in Section 67-1-5.

(2) No adult who owns or leases a private residence or private premises shall knowingly allow a party to take place or continue at the residence or premises if a minor at the party obtains, possesses or consumes any alcoholic beverage, light wine or beer if the adult knows that the minor has obtained, possesses or is consuming alcoholic beverages, light wine or beer.

(3) This section shall not apply to legally protected religious activities or gatherings of family members or to any of the exemptions set forth in Section 67-3-54.

(4) Each incident in violation of subsection (2) of this section or any part of subsection (2) constitutes a separate offense.

(5) Any person who violates subsection (2) of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of One Thousand Dollars (\$1,000.00) or by imprisonment in the county jail for not more than ninety (90) days, or by both the fine and imprisonment, in the discretion of the court.

SOURCES: Laws, 2011, ch. 435; Laws, 2011, ch. 472, § 1, eff from and after July 1, 2011.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-5-51. Mandatory reporting of sex crimes against minors; definitions; procedure; report contents; forensic samples; penalties.

(1) **Definitions.** — For the purposes of this section:

(a) “Sex crime against a minor” means any offense under at least one (1) of the following statutes when committed by an adult against a minor who is under the age of sixteen (16):

(i) Section 97-3-65 relating to rape;

(ii) Section 97-3-71 relating to rape and assault with intent to ravish;

(iii) Section 97-3-95 relating to sexual battery;

(iv) Section 97-5-23 relating to the touching of a child, mentally defective or incapacitated person or physically helpless person for lustful purposes;

(v) Section 97-5-41 relating to the carnal knowledge of a stepchild, adopted child or child of a cohabiting partner;

(vi) Section 97-5-33 relating to exploitation of children;

(vii) Section 97-3-54.1(1)(c) relating to procuring sexual servitude of a minor;

(viii) Section 43-47-18 relating to sexual abuse of a vulnerable person;

(ix) Section 97-1-7 relating to the attempt to commit any of the offenses listed in this subsection.

(b) “Mandatory reporter” means any of the following individuals performing their occupational duties: health care practitioner, clergy member, teaching or child care provider, law enforcement officer, or commercial image processor.

(c) “Health care practitioner” means any individual who provides health care services, including a physician, surgeon, physical therapist, psychiatrist, psychologist, medical resident, medical intern, hospital staff member, licensed nurse and emergency medical technician or paramedic.

(d) “Clergy member” means any priest, rabbi or duly ordained deacon or minister.

(e) “Teaching or child care provider” means anyone who provides training or supervision of a minor under the age of sixteen (16), including a teacher, teacher’s aide, principal or staff member of a public or private school, social worker, probation officer, foster home parent, group home or other child care institutional staff member, personnel of residential home facilities, a licensed or unlicensed day care provider.

(f) “Commercial image processor” means any person who, for compensation: (i) develops exposed photographic film into negatives, slides or prints; (ii) makes prints from negatives or slides; or (iii) processes or stores digital media or images from any digital process, including, but not limited to, website applications, photography, live streaming of video, posting, creation of power points or any other means of intellectual property communication or media including conversion or manipulation of still shots or video into a digital show stored on a photography site or a media storage site.

(g) “Caretaker” means any person legally obligated to provide or secure adequate care for a minor under the age of sixteen (16), including a parent, guardian, tutor, legal custodian or foster home parent.

(2)(a) **Mandatory reporter requirement.** — A mandatory reporter shall make a report if it would be reasonable for the mandatory reporter to suspect that a sex crime against a minor has occurred.

(b) Failure to file a mandatory report shall be punished as provided in this section.

(c) Reports made under this section and the identity of the mandatory reporter are confidential except when the court determines the testimony of the person reporting to be material to a judicial proceeding or when the identity of the reporter is released to law enforcement agencies and the appropriate prosecutor. The identity of the reporting party shall not be disclosed to anyone other than law enforcement or prosecutors except under

court order; violation of this requirement is a misdemeanor. Reports made under this section are for the purpose of criminal investigation and prosecution only and information from these reports is not a public record. Disclosure of any information by the prosecutor shall conform to the Mississippi Uniform Rules of Circuit and County Court Procedure.

(d) Any mandatory reporter who makes a required report under this section or participates in a judicial proceeding resulting from a mandatory report shall be presumed to be acting in good faith. Any person or institution reporting in good faith shall be immune from any liability, civil or criminal, that might otherwise be incurred or imposed.

(3)(a) **Mandatory reporting procedure.** — A report required under subsection (2) must be made immediately to the law enforcement agency in whose jurisdiction the reporter believes the sex crime against the minor occurred. Except as otherwise provided in this subsection (3), a mandatory reporter may not delegate to any other person the responsibility to report, but shall make the report personally.

(i) The reporting requirement under this subsection (3) is satisfied if a mandatory reporter in good faith reports a suspected sex crime against a minor to the Department of Human Services under Section 43-21-353.

(ii) The reporting requirement under this subsection (3) is satisfied if a mandatory reporter reports a suspected sex crime against a minor by following a reporting procedure that is imposed:

1. By state agency rule as part of licensure of any person or entity holding a state license to provide services that include the treatment or education of abused or neglected children; or

2. By statute.

(b) **Contents of the report.** — The report shall identify, to the extent known to the reporter, the following:

(i) The name and address of the minor victim;

(ii) The name and address of the minor's caretaker;

(iii) Any other pertinent information known to the reporter.

(4) **Maintenance of forensic samples.** — Any physician who performs an abortion on a minor who is less than fourteen (14) years of age at the time of the abortion procedure shall preserve fetal tissue extracted during the abortion in accordance with rules and regulations adopted pursuant to this section if it would be reasonable to suspect that the pregnancy being terminated is the result of a sex crime against a minor.

(a) The State Medical Examiner shall adopt rules and regulations consistent with Section 99-49-1 that prescribe:

(i) The amount and type of fetal tissue to be preserved and submitted by a physician pursuant to this section;

(ii) Procedures for the proper preservation of the tissue for the purpose of DNA testing and examination;

(iii) Procedures for documenting the chain of custody of such tissue for use as evidence;

(iv) Procedures for proper disposal of fetal tissue preserved pursuant to this section;

(v) A uniform reporting instrument mandated to be utilized by physicians when submitting fetal tissue under this section which shall include the name of the physician submitting the fetal tissue and the complete residence address and name of the parent or legal guardian of the minor upon whom the abortion was performed; and

(vi) Procedures for communication with law enforcement agencies regarding evidence and information obtained pursuant to this section.

(b) Failure of a physician to comply with any provision of this subsection (4) or any rule or regulation adopted under this subsection (4) may constitute unprofessional conduct for the purposes of Section 73-25-29, and also shall be punished as provided in this section.

(5) **Penalties.** — (a) A person who is convicted of a first offense under this section shall be guilty of a misdemeanor and fined not more than Five Hundred Dollars (\$500.00).

(b) A person who is convicted of a second offense under this section shall be guilty of a misdemeanor and fined not more than One Thousand Dollars (\$1,000.00), or imprisoned for not more than thirty (30) days, or both.

(c) A person who is convicted of a third or subsequent offense under this section shall be guilty of a misdemeanor and fined not more than Five Thousand Dollars (\$5,000.00), or imprisoned for not more than one (1) year, or both.

(6) No physician shall be liable for any penalty under this section for good faith compliance with any rules and regulations adopted pursuant to this section.

SOURCES: Laws, 2012, ch. 519, § 1, eff from and after July 1, 2012.

Editor's Note — Laws of 2012, ch. 519, § 2, provides:

“SECTION 2. **Severability.** Any provision of this act held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable herefrom and shall not affect the remainder hereof or the application of such provision to other persons not similarly situated or to other dissimilar circumstances.”

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

CHAPTER 7

Crimes Against Sovereignty or Administration of Government

SEC.

97-7-21 through 97-7-27. Repealed

§§ 97-7-21 through 97-7-27. Repealed.

Repealed by Laws, 2009, ch. 369, § 1, effective upon passage (March 17, 2009).

§ 97-7-21. [Codes, 1942, § 2066.5-01; Laws, 1964, ch. 323, § 1, eff from and after passage (approved June 11, 1964).]

§ 97-7-23. [Codes, 1942, § 2066.5-02; Laws, 1964, ch. 323, § 2, eff from and after passage (approved June 11, 1964).]

§ 97-7-25. [Codes, 1942, § 2066.5-03; Laws, 1964, ch. 323, § 3, eff from and after passage (approved June 11, 1964).]

§ 97-7-27. [Codes, 1942, § 2066.5-04; Laws, 1964, ch. 323, § 4, eff from and after passage (approved June 11, 1964).]

Editor's Note — Former § 97-7-21 defined criminal syndicalism.

Former § 97-7-23 provided the penalties for the commission of certain acts of criminal syndicalism.

Former § 97-7-25 made assemblage for the purpose of advocating, encouraging, teaching or suggesting the doctrine of criminal syndicalism unlawful.

Former § 97-7-27 provided a penalty for permitting the use of a place or building for unlawful assemblage.

CHAPTER 9

Offenses Affecting Administration of Justice

Article 1.	In General	97-9-1
Article 3.	Obstruction of Justice	97-9-101

ARTICLE 1.

IN GENERAL.

SEC.

97-9-25. Escape of inmates of state institutions; aiding, abetting, etc.

§ 97-9-25. Escape of inmates of state institutions; aiding, abetting, etc.

It shall be unlawful for any person, firm, copartnership, corporation or association to knowingly entice, harbor, employ, or aid, assist or abet in the escape, enticing, harboring or employment of any delinquent, person with mental illness, person with an intellectual disability or incorrigible person committed to, or confined in any institution maintained by the state for the treatment, education or welfare of delinquent persons, persons with mental illness, persons with an intellectual disability or incorrigible persons. Any person violating the provisions of this section, upon conviction, shall be punished by a fine of not less than Twenty-five Dollars (\$25.00) nor more than Five Hundred Dollars (\$500.00), or imprisonment in the county jail for not less than thirty (30) days, nor more than ninety (90) days, or both.

SOURCES: Codes, 1930, § 901; 1942, § 2130; Laws, 1930, ch. 25; Laws, 2008, ch. 442, § 33; Laws, 2010, ch. 476, § 80, eff from and after passage (approved Apr. 1, 2010.)

Amendment Notes — The 2008 amendment, in the first sentence, substituted “person with mental illness, person with mental retardation” for “insane, feeble minded” and “delinquent persons, persons with mental illness, persons with mental

retardation or incorrigible persons” for “delinquent or feeble minded, incorrigible or insane person”; and made a minor stylistic change.

The 2010 amendment substituted “an intellectual disability” for “mental retardation” both times it appears.

JUDICIAL DECISIONS

1. Application.

In a case where a patient in a mental health facility was injured during an attempted escape, liability was not precluded under Miss. Code Ann. § 97-9-25

and Miss. Code Ann. § 11-46-9(1)(f) because an attempted escape by a mental patient was not a criminal act. Miss. Dep’t of Mental Health v. Hall, 936 So. 2d 917 (Miss. 2006).

§ 97-9-39. Escape of prisoners; refusal of officer, jailer, etc., to arrest or confine; refusal to receive prisoners at jail; suffering an escape; accepting bribe to permit escape.

ATTORNEY GENERAL OPINIONS

A sheriff is not lawfully obligated to receive municipal prisoners unless the city has a contract with the county to do

so. Sanders, Dec. 9, 2005, A.G. Op. 05-0587.

§ 97-9-49. Escape of prisoners; penalties for convicts in jail and persons under arrest or custody; willful failure to return to jail after being entrusted to leave.

JUDICIAL DECISIONS

2. “Force or violence”.

6. Evidence.

2. “Force or violence”.

Although defendant argued there was no evidence of “force” to support his conviction for attempted escape by force, Miss. Code Ann. § 97-9-49(1)(a), the verdict was not against the manifest weight of evidence because someone had tampered with the air conditioning unit on the jail roof above where defendant’s cell was located, a door was off the air conditioning unit, the filter and insulation from the pipes had been ripped and torn, the pipe chase door and the unit were not intended for access or exit, two inmates were spotted through video surveillance on the jail roof, two inmates were seen climbing the fence located around the jail, and defendant was apprehended at the fence. Stewart v. State, 69 So. 3d 768 (Miss. Ct. App. 2011).

6. Evidence.

Defendant’s conviction for attempted felony escape in violation of Miss. Code Ann. § 97-9-49(1) was proper in part because several witnesses testified regarding the attempted escape, including an eyewitness sergeant who testified that defendant scaled the fence and pried apart adjoining sections of the fence. Jones v. State, 974 So. 2d 250 (Miss. Ct. App. 2007).

Because defendant violated the conditions of his felony appearance bond on the underlying felony charges of conspiring to smuggle drugs into a county jail, his bond was revoked, and he was arrested. Defendant escaped from custody while being held on felony charges; thus, the evidence showed that he committed felony escape and was subject to the punishment provisions of Miss. Code Ann. § 97-9-49(1). Sessom v. State, 942 So. 2d 234 (Miss. Ct. App. 2006), writ of certiorari denied by

942 So. 2d 164, 2006 Miss. LEXIS 716 (Miss. 2006).

§ 97-9-53. Indictments; penalty for disclosing facts relating to indictment.

ATTORNEY GENERAL OPINIONS

The fact of an indictment being found or returned into court against a Defendant may only be disclosed to the Judge, Clerk, District Attorney, and Sheriff until the

Defendant has been arrested or given bail or recognizance for the offense. Lawrence, February 23, 2007, A.G. Op. #07-00070, 2007 Miss. AG LEXIS 27.

§ 97-9-55. Intimidating judge, juror, witness, attorney, etc., or otherwise obstructing justice.

JUDICIAL DECISIONS

2. Particular applications.

Miss. Code Ann. § 97-9-55, which makes it a criminal offense to intimidate a judge, was not unconstitutional where defendant was charged with a violation for making threats against two judges while speaking with a psychologist who treated inmates because U.S. Const. Amend. I permitted states to ban true threats and because the protected status of threatening speech was not based upon the subjective intent of the speaker; rather, the speaker must have knowingly and intentionally communicated a potential threat that an objectively reasonable person

would interpret as a serious expression of an intent to cause a present or future harm. Defendant's words posed a true threat because he was diagnosed as having the capacity to distinguish right from wrong, he intentionally communicated the threats to his psychologist and to members of the parole board, and an objectively reasonable person would interpret statements such as intending to "take care of the judges" or "take out the judges" as intending to inflict physical harm upon the judges. Hearn v. State, 3 So. 3d 722 (Miss. 2008).

§ 97-9-59. Perjury; definition.

JUDICIAL DECISIONS

- 0.5 Formal complaint needed.
- 6. Proof, generally.
- 7. —Sufficiency.

0.5 Formal complaint needed.

Commission on Judicial Performance (Commission) contended that the judge committed perjury; however, the Commission never formally charged the judge with perjury and therefore, in the absence of a formal complaint and a hearing on the merits, the supreme court lacked the authority to accept the finding of the Commission on the perjury count. Miss.

Comm'n on Judicial Performance v. Osborne, 11 So. 3d 107 (Miss. 2009).

Mississippi Commission on Judicial Performance (Commission) contended to the Mississippi Supreme Court that the judge committed perjury pursuant to Miss. Code Ann. § 97-9-59; however, the Commission never formally charged the judge with perjury, and thus, in the absence of a formal complaint and a hearing on the merits, the supreme court lacked the authority to accept the finding of the Commission on the perjury count. Miss. Comm'n on Judicial Performance v. Os-

borne, — So. 2d —, 2009 Miss. LEXIS 9 (Miss. Feb. 5, 2009), opinion withdrawn by, substituted opinion at 11 So. 3d 107, 2009 Miss. LEXIS 278 (Miss. 2009).

6. Proof, generally.

7. —Sufficiency.

Evidence was sufficient and not against the overwhelming weight of the evidence to convict defendant of perjury during his probation revocation hearing because, *inter alia*: (1) the state provided the testi-

mony of a district attorney and a federal district court clerk, and introduced into evidence the federal documents that proved that defendant was not under court order to be in the county (in violation of his probation) on October, 13, 2003; thus, because defendant was not required to be in the county on that day, he lied about it at his probation revocation hearing, and therefore under Miss. Code Ann. § 97-9-59 his perjury conviction was proper. *Ford v. State*, 956 So. 2d 301 (Miss. Ct. App. 2006).

§ 97-9-72. Fleeing or eluding a law enforcement officer in a motor vehicle; felonies; sanctions; defenses.

JUDICIAL DECISIONS

1. Evidence.
2. Indictment.

1. Evidence.

Evidence was legally sufficient to support defendant's conviction for felony fleeing, in violation of Miss. Code Ann. § 97-9-72(2), because a detective testified that after turning on the siren in an unmarked patrol car, defendant momentarily lost control of defendant's vehicle and nearly hit a utility pole, but the vehicle continued to evade the detective. *Tugle v. State*, 68 So. 3d 691 (Miss. Ct. App. 2010), writ of certiorari denied by 69 So. 3d 767, 2011 Miss. LEXIS 416 (Miss. 2011).

Where an officer saw a vehicle speeding with an expired tag, he activated his blue lights and defendant led him on high speed chase until he crashed; the officer identified defendant as a former classmate. Defendant's conviction for fleeing a law enforcement officer in a motor vehicle, in violation of Miss. Code Ann. § 97-9-72, was not against the weight of the evidence; therefore, the trial court did not err by denying his motion for judgment notwithstanding the verdict or a new trial. *Cole v. State*, 8 So. 3d 250 (Miss. Ct. App. 2008).

Defendant's conviction for felony eluding of a police officer, in violation of Miss. Code Ann. § 97-9-72(1) and (2), was supported by the evidence because officers testified that defendant drove through their roadblock without stopping and that they both ordered defendant to stop; the officers had to force defendant onto a dead-end street in order to make defendant stop the car. *Betts v. State*, 10 So. 3d 519 (Miss. Ct. App. 2009).

2. Indictment.

Underlying crime is not an essential element of fleeing a law officer in a motor vehicle; therefore, there was no need for an indictment to allege such. *Bacon v. State*, 950 So. 2d 250 (Miss. Ct. App. 2007).

In the context of Miss. Code Ann. § 97-9-72, a person's failure to obey a signal to stop a motor vehicle signifies that the person is continuing to operate the motor vehicle; therefore, where an indictment alleged that defendant, after being signaled to stop by an officer, continued to operate his vehicle with a reckless disregard for the safety of others, it was sufficient to allege a violation of Miss. Code Ann. § 97-9-72(2). *Bacon v. State*, 950 So. 2d 250 (Miss. Ct. App. 2007).

§ 97-9-73. Resisting or obstructing arrest; fleeing or eluding law enforcement officer in motor vehicle.

JUDICIAL DECISIONS

1. In general.
2. Double jeopardy.

1. In general.

Even if a verdict finding defendant guilty of resisting arrest was inconsistent with a verdict of not guilty of simple assault on a police officer, that inconsistency was not grounds for reversal as the evidence was sufficient to sustain the resisting arrest conviction; an officer testified that after defendant struck another officer in the chest, a “fierce struggle” ensued while officers attempted to place defendant in handcuffs. *Chambers v. State*, 973 So. 2d 266 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 244, 2007 Miss. LEXIS 699 (Miss. 2007).

When a jury found defendant guilty of resisting arrest, but acquitted him of the charge of aggravated assault on a police officer, the verdict was not necessarily inconsistent because, among other things, the record showed that defendant struck an officer in the chest when the officer

tried to arrest defendant. *Chambers v. State*, — So. 2d —, 2007 Miss. App. LEXIS 108 (Miss. Ct. App. Feb. 27, 2007), opinion withdrawn by, substituted opinion at 973 So. 2d 266, 2007 Miss. App. LEXIS 692 (Miss. Ct. App. 2007).

Officer had reasonable suspicion to investigate a suspicious white vehicle following a report of a vehicle theft, and then probable cause to detain its occupants for further questioning in light of their failure to respond and resisting arrest. *Qualls v. State*, 947 So. 2d 365 (Miss. Ct. App. 2007).

2. Double jeopardy.

Defendant was not subject to double jeopardy, even though defendant was issued a citation for resisting arrest and was later convicted of simple assault on a law enforcement officer, where a clear reading of the statutes established that the two offenses contained an element that was lacking from the other. *Roncali v. State*, 980 So. 2d 959 (Miss. Ct. App. 2008).

§ 97-9-75. Resisting service of process.

JUDICIAL DECISIONS

1. In general.

Although an arrestee was found not guilty of violating Miss. Code Ann. § 97-9-75 because a state environmental quality department letter that a deputy sheriff attempted to serve on the arrestee did not qualify as “process” for purposes of § 97-9-75, the deputy was entitled to qualified

immunity in the arrestee’s 42 U.S.C.S. § 1983 false arrest suit, as the deputy reasonably relied on the advice of the sheriff’s department’s attorney that the letter constituted process. *Brassell v. Turner*, 468 F. Supp. 2d 854 (S.D. Miss. 2006).

ARTICLE 3.

OBSTRUCTION OF JUSTICE.

- SEC.
97-9-116. Bribing a judge.

§ 97-9-116. Bribing a judge.

(1) A person commits the crime of bribing a judge if he intentionally or knowingly offers, confers or agrees to confer any benefit upon a judge with the intent that the judge's decision, vote, recommendation or other exercise of official discretion in a judicial or administrative proceeding will thereby be influenced.

(2) Bribing a judge is a felony punishable by imprisonment for not less than five (5) years nor more than twenty (20) years and by a fine three (3) times the amount of the bribe but in no case less than Twenty-five Thousand Dollars (\$25,000.00).

SOURCES: Laws, 2008, ch. 428, § 1, eff from and after July 1, 2008.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

§ 97-9-125. Tampering with physical evidence.

JUDICIAL DECISIONS

3. Counterfeit documents.

Defendant's former attorney's testimony that he received a fraudulent certificate of title and a bill of sale from defendant for the stolen vehicle did not violate the attorney-client privilege because when defendant provided the documents to his attorney, there was no expectation of confidentiality or privilege concerning the documents or the fact that defendant provided them. The documents defendant provided were to be presented to the State

as discovery under Miss. Unif. Cir. & County Ct. Prac. R. 9.04(c)(2), the trial court, and the jurors in his defense, and therefore no privilege existed under Miss. R. Evid. 502. In addition, because the documents were counterfeit, defendant committed a crime under Miss. Code Ann. § 97-9-125 (Rev. 2006); by involving his attorney, and any privilege or confidentiality was destroyed. *Hayden v. State*, 972 So. 2d 525 (Miss. 2007).

CHAPTER 11

Offenses Involving Public Officials

§ 97-11-11. Bribery; offer, promise or gift of property to candidate, officer, agent or trustee to influence his action.

JUDICIAL DECISIONS

1. In general.

Because the State was not required to prove that the money given to a chief of police constituted bribe money, a reasonable jury could have concluded beyond a reasonable doubt that defendant offered to pay money to the chief of police in an attempt to influence the chief's actions

and as such bribed a public official in violation of Miss. Code Ann. § 97-11-11. The evidence include testimony that after a burglary at juke joint, which was owned by defendant's brother and had illegal gaming machines, defendant told the chief that he would give him money if the chief warned defendant and his brother when

the Mississippi Gaming Commission was coming; that the chief warned defendant; and that the chief later received money.

Patton v. State, 987 So. 2d 1063 (Miss. Ct. App. 2008).

§ 97-11-25. Embezzlement; officers, trustees and public employees converting property to own use.

JUDICIAL DECISIONS

3. Evidence.

There was sufficient evidence to support a conviction for embezzlement under Miss. Code Ann. § 97-11-25 because defendant, as a mayor of a town, did not have permission to take cabinets inside of a city building, and the evidence showed

that the cabinets in question were city property instead of the property of a former tenant; a mistake of fact defense was rejected because the evidence showed that defendant was put on notice that the cabinets were city property. Logan v. State, 951 So. 2d 630 (Miss. Ct. App. 2007).

§ 97-11-31. Embezzlement; fraud committed in public office.

JUDICIAL DECISIONS

2. Indictment.

Indictment was not defective because it did not contain the type of personal use defendant engaged in that led to his indictment for embezzlement and fraud because the indictment sufficiently stated

the essential elements of the crime and the acts which constituted the embezzlement or fraud. Terry v. State, 26 So. 3d 378 (Miss. Ct. App. 2009), writ of certiorari denied by 24 So. 3d 1038, 2010 Miss. LEXIS 34 (Miss. 2010).

CHAPTER 15

Offenses Affecting Highways, Ferries and Waterways

SEC.

- 97-15-13. Hunting or shooting on or across streets and highways; shooting, etc., at traffic control devices.
- 97-15-21. Levees; breaking enclosures; depositing trash, etc., or storing commodities; damaging.
- 97-15-23. Levees; disfiguring, etc., or excavating dirt or sand on levee right-of-way.
- 97-15-27. Levees; hunting or engaging in target practice upon mainline levee structure or right-of-way.
- 97-15-29. Littering highways and private property with trash or substance likely to cause fire; civil liability; fines; disposition of proceeds.
- 97-15-32. Dumping of dead wildlife, wildlife parts or waste in or on highways, private property, lakes, navigable waters, etc.; penalties.

§ 97-15-13. Hunting or shooting on or across streets and highways; shooting, etc., at traffic control devices.

(1)(a) The provisions of this subsection shall only be applicable during the calendar days included in the open seasons on deer and turkey.

(b) It shall be unlawful for any person to hunt, if such person is in the possession of a firearm that is not unloaded on any street, public road, public

highway, levee, or any railroad which is maintained by any railroad corporation, city, county, levee board, state or federal entity or the right-of-way of any such street, road, highway, levee or railroad.

(c) The provisions of this subsection shall not apply to any person engaged in a lawful action to protect his property or livestock.

(2) For purposes of this section, the following terms shall have the meanings ascribed to them herein:

(a) "Right-of-way" means that part of a street, public road, public highway, levee or railroad maintained by a city, county, levee board, state or federal entity or railroad corporation and including that portion up to the adjacent property line or fence line.

(b) "Motorized vehicle" means any vehicle powered by any type of motor, including automobiles, farm vehicles, trucks, construction vehicles and all-terrain vehicles.

(c) "Firearm" means any firearm other than a handgun.

(d) "Hunt" or "hunting" means to hunt or chase or to shoot at or kill or to pursue with the intent to take, kill or wound any wild animal or wild bird with a firearm as defined in this subsection.

(e) "Unloaded" means that a cartridge or shell is not positioned in the barrel or magazine of the firearm or in a clip, magazine or retainer attached to the firearm; or in the case of a caplock muzzle-loading firearm, "unloaded" means that the cap has been removed; or in the case of a flintlock muzzle-loading firearm, "unloaded" means that all powder has been removed from the flashpan.

(3) If any person hunts or discharges any firearm in, on or across any street, public road, public highway, levee, railroad or the right-of-way thereof, such person is guilty of a misdemeanor and, upon conviction, shall be punished by a fine not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00) or by imprisonment in the county jail for not less than sixty (60) days nor more than six (6) months, or by both such fine and imprisonment. This subsection shall not apply to any law enforcement officer while in the performance of his official duty or to any person engaged in a lawful action of self-defense.

(4) If any person shall willfully shoot any firearms or hurl any missile at any street, highway or railroad traffic light; street, highway or railroad marker or other sign for the regulation or designation of street, highway or railroad travel such person, upon conviction, shall be fined not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00), or be imprisoned not longer than thirty (30) days in the county jail, or both.

(5) It shall be the duty of all sheriffs, deputy sheriffs, constables, conservation officers and peace officers of this state to enforce the provisions of this section.

(6) If any subsection, paragraph, sentence, clause, phrase or any part of this section is hereafter declared to be unconstitutional or void, or if for any reason is declared to be invalid or of no effect, the remaining subsections, paragraphs, sentences, clauses, phrases or parts thereof shall be in no manner affected thereby but shall remain in full force and effect.

SOURCES: Codes, 1857, ch. 64, art. 365; 1871, § 2870; 1880, § 2941; 1892, § 1148; 1906, § 1226; Hemingway's 1917, § 956; 1930, § 983; 1942, § 2213; Laws, 1964, ch. 349; Laws, 1971, ch. 443, § 1; Laws, 1974, ch. 569, § 23; Laws, 1982, ch. 454; Laws, 1985, ch. 452, § 17; Laws, 1990, ch. 528, § 1; Laws, 2008, ch. 386, § 1; Laws, 2012, ch. 341, § 1, eff from and after July 1, 2012.

Amendment Notes — The 2008 amendment added “levee” and “levee board” throughout.

The 2012 amendment in (1)(b), substituted “unlawful for any person to hunt” for “prima facie evidence that a person is hunting” following “It shall be” at the beginning and deleted “in an area in which wild game is or may be present, regardless of whether or not such firearm is within or without the confines of a motorized vehicle” from the end.

§ 97-15-21. Levees; breaking enclosures; depositing trash, etc., or storing commodities; damaging.

If any person shall willfully cut, break down, remove, destroy or damage any cattle gap or any fence or part thereof erected by any board of levee commissioners or the agents or employees of said board of levee commissioners for the purpose of enclosing any levee right-of-way under the control of said board of levee commissioners or who shall break down, remove or destroy any gate in any such fence, or shall willfully leave unclosed and open any such gate after having opened same, or make said levee or said levee right-of-way a place of deposit or storage for any woodpiles or refuse, garbage or dead animals or any cotton, lumber, bricks or any other commodities, or who shall willfully do any material damage injurious to said levee, such person or persons shall be guilty of a misdemeanor and, on conviction, shall be fined not less than One Hundred Dollars (\$100.00) nor more than One Thousand Dollars (\$1,000.00) for each offense. In addition to the penalties herein provided for, if any levee board is required to remove any such forbidden objects herein described, the owner or owners of such forbidden objects shall be liable in damages to the levee board for the cost of removing such objects, which damages may be recovered in a court action brought for that purpose; and the said levee board shall have a right of action against any person for any other damage sustained to the levee or levee right-of-way by reason of a violation of this section.

SOURCES: Codes, Hemingway's 1917, § 1006; 1930, § 1035; 1942, § 2267; Laws, 1906, ch. 126; Laws, 1948, ch. 357; Laws, 1968, ch. 353, § 1; Laws, 1999, ch. 433, § 1; Laws, 2008, ch. 386, § 2, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment substituted “enclosing any levee” for “enclosing the public levee” near the beginning and “the levee or levee right-of-way” for “the levees” near the end.

§ 97-15-23. Levees; disfiguring, etc., or excavating dirt or sand on levee right-of-way.

If any person or persons shall willfully cut into, mutilate or disfigure any levee or excavate dirt or sand from the right-of-way owned by any board of

levee commissioners or any part thereof, or trespass upon said levee in violation of posted regulations, without being authorized to do so by the said board of levee commissioners, such person or persons shall be guilty of a misdemeanor, and on conviction shall be fined not less than One Hundred Dollars (\$100.00) nor more than One Thousand Dollars (\$1,000.00) for each offense, or shall be confined in the county jail for a term not exceeding thirty (30) days, or by both such fine and imprisonment in the discretion of the court.

SOURCES: Codes, Hemingway's 1917, § 1005; 1930, § 1034; 1942, § 2266; Laws, 1906, ch. 129; Laws, 1979, ch. 395; Laws, 1999, ch. 433, § 2; Laws, 2008, ch. 386, § 3, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment deleted “public” following “mutilate or disfigure any” near the beginning.

§ 97-15-27. Levees; hunting or engaging in target practice upon mainline levee structure or right-of-way.

If any person shall hunt or engage in target practice upon any levee structure erected by any board of levee commissioners, the entire landside right-of-way of said levee structure or the riverside right-of-way of said levee structure within a distance of two hundred (200) feet from the toe of said levee structure, such person or persons shall be guilty of a misdemeanor and, on conviction, shall be fined not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00) for each offense.

SOURCES: Codes, 1942, § 2267.1; Laws, 1968, ch. 353, § 2; Laws, 1999, ch. 433, § 3; Laws, 2008, ch. 386, § 4, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment substituted “upon any levee structure” for “upon the mainline levee structure” near the beginning.

§ 97-15-29. Littering highways and private property with trash or substance likely to cause fire; civil liability; fines; disposition of proceeds.

(1) Anyone who shall put, throw, dump or leave on the roads and highways of this state, or within the limits of the rights-of-way of such roads and highways, or upon any private property, any cigarette or cigar stubs, or any other thing or substance likely to ignite the grass or underbrush on a road or highway, in addition to being civilly liable for all damages caused by such act shall, upon conviction, be guilty of a misdemeanor and punished as provided by subsection (3) of this section.

(2) The Department of Transportation is authorized to erect warning signs along the roads and highways of this state advising the public of the existence of this section and of the penalty for the violation thereof and is further authorized to install receptacles at reasonable intervals along the roads and highways of this state to be used as containers for trash and rubbish and for the convenience of the public using such roads and highways.

(3) Any person found guilty of the violation of this section shall, upon conviction, be fined not less than Fifty Dollars (\$50.00) nor more than Two Hundred Fifty Dollars (\$250.00). The proceeds of such fines shall be expended by the collecting jurisdiction solely for the purpose of funding local litter prevention programs or projects or local or school litter education programs as recommended by the statewide litter prevention program of Keep Mississippi Beautiful, Inc.

(4) As a part of the fine imposed by subsection (3) above, a person convicted for an offense upon which fines are imposed by this section may be required to perform the following, and a person convicted for a second or subsequent offense upon which fines are imposed by this section shall be required to:

(a) Remove or render harmless, in accordance with written direction, as appropriate, from the Department of Environmental Quality or local law enforcement authorities, the unlawfully discarded solid waste;

(b) Repair or restore property damaged by, or pay damages for any damage arising out of the unlawfully discarded solid waste;

(c) Perform community public service relating to the removal of any unlawfully discarded solid waste or to the restoration of any area polluted by unlawfully discarded solid waste; and

(d) Pay all reasonable investigative and prosecutorial expenses and costs to the investigative and/or prosecutorial agency or agencies.

(5) Upon a second or subsequent conviction of an offense upon which fines are imposed by this section, the minimum and maximum fines shall be doubled.

(6) When any litter is thrown or discarded from a motor vehicle, the operator of the motor vehicle shall be deemed in violation of this section.

(7) There shall be imposed and collected an assessment of Fifty Dollars (\$50.00) on each violation of this section. The assessment shall be deposited into the Law Enforcement Officers Monument Fund created in Section 39-5-71. After the monument is constructed, the assessment shall not be deposited into the fund. The assessment shall then be deposited with the Board of Trustees of State Institutions of Higher Learning to be used for the scholarship program for children of deceased or disabled law enforcement officers and firemen as provided by Sections 37-107-1 through 37-107-9.

(8) It shall be the duty of all law enforcement officers to enforce the provisions of this section.

(9) This section shall not prohibit the storage of ties and machinery by a railroad on its right-of-way where the highway right-of-way extends to within a few feet of the railroad roadbed.

SOURCES: Codes, 1942, § 2214.5; Laws, 1956, ch. 243; Laws, 1958, ch. 238, §§ 1-8; Laws, 1964, ch. 350, §§ 1, 2 [¶¶ 1, 2]; Laws, 1973, ch. 351, § 1; Laws, 1988, ch. 574, § 3; Laws, 1990, ch. 329, § 13; Laws, 1991, ch. 531, § 24; Laws, 1994, ch. 543, § 3; Laws, 1995, ch. 500, § 1; Laws, 2000, ch. 421, § 1; Laws, 2007, ch. 509, § 1; Laws, 2012, ch. 554, § 7, eff from and after July 1, 2012.

Amendment Notes — The 2007 amendment deleted former (1)(b), which prohibited dumping dead wildlife and wildlife parts on streets, roads and private property, and redesignated former (1)(a) as present (1); and added (8) and redesignated former (8) and (9) as present (9) and (10).

The 2012 amendment deleted (7), which read: “Assessments collected under subsection (4) of Section 99-19-73 from persons convicted of a violation of this section shall be deposited to the credit of the Statewide Litter Prevention Fund created in Section 65-1-167”; redesignated former (8) through (10) as (7) through (9); and in present (7), deleted “In addition to the assessments collected under subsection (4) of Section 99-19-73” from the beginning.

Cross References — Law Enforcement Officers Monument Fund, see § 39-5-71.

Department of Environmental Quality generally, see §§ 49-2-1 et seq.

Contract with Keep Mississippi Beautiful, Inc. for development of comprehensive statewide litter prevention program, see § 65-1-165.

Dumping of dead wildlife, wildlife parts or waste in or on highways, private property, lakes, navigable waters, etc., see § 97-15-32.

§ 97-15-32. Dumping of dead wildlife, wildlife parts or waste in or on highways, private property, lakes, navigable waters, etc.; penalties.

(1) Anyone who puts, throws or dumps on the streets, roads or highways within this state, or within the limits of the rights-of-way of such streets, roads or highways, or in the lakes, streams, rivers or navigable waters or upon any private property without permission of the owner of such property, any dead wildlife, wildlife parts or waste, in addition to being civilly liable for all damages caused by such act, upon conviction, shall be guilty of a misdemeanor and punished as provided in this section.

(2) Any person found guilty of the violation of this section shall, upon conviction, be fined not less than Two Hundred Dollars (\$200.00) nor more than Four Hundred Dollars (\$400.00).

(3) A person convicted for a first offense under this section may be required to perform the following, and a person convicted for a second or subsequent offense shall be required to:

(a) Remove the unlawfully discarded dead wildlife or waste;

(b) Restore property damaged by, or pay damages for any damage arising out of the unlawfully discarded dead wildlife or waste;

(c) Perform community public service relating to the removal of any unlawfully discarded dead wildlife or waste or to the restoration of any area polluted by unlawfully discarded dead wildlife or waste; and

(d) Pay all reasonable investigative and prosecutorial expenses and costs to the investigative and/or prosecutorial agency or agencies.

(4) It shall be the duty of all law enforcement officers to enforce the provisions of this section.

SOURCES: Laws, 2007, ch. 509, § 2, eff from and after July 1, 2007.

CRIMES AGAINST PROPERTY

CHAPTER 17

Crimes Against Property

In General	97-17-1
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IN GENERAL

SEC.	
97-17-23.	Burglary; breaking and entering inhabited dwelling; home invasion.
97-17-42.	Taking possession of or taking away a motor vehicle.
97-17-62.	Larceny; theft of rental property.
97-17-67.	Malicious mischief.
97-17-68.	Coin operated devices; description of offenses and imposition of penalties; prosecution under this section does not bar prosecution or punishment under other statutes.
97-17-70.	Receiving stolen property; dual charges of both stealing and receiving same property not to be brought against single defendant in same jurisdiction; penalties.
97-17-71.	Receiving stolen property; definitions; scrap metal dealers and other purchasers to keep records of purchases of metal property; content of records; metal property to be held separate and identifiable from other purchases for not less than three (3) business days from date of purchase; inspection by law enforcement personnel; hold notice; recovery of metal property by rightful owner; restitution to dealer by unlawful seller; false statement of ownership; cash transactions for purchase of scrap metal prohibited; failure to maintain appropriate records; interstate transportation of metal property; purchase and possession of metal beer kegs and/or metal syrup tanks generally used by soft drink industry prohibited except in limited circumstances; purchase of utility access covers or metal property identified as belonging to political subdivision except in limited circumstances; purchases of metal property from minors prohibited; limitation on hours of purchase; penalties.
97-17-71.1.	Registration by scrap metal dealers with office of Secretary of State required; penalties for violations; enforcement.
97-17-71.2.	Scrap metal dealers prohibited from paying cash or making payment of any kind at time of transaction for air conditioner evaporator coil or condenser; scrap metal dealers permitted to purchase air conditioner evaporator coil or condenser only from certain contractors or companies; payment for scrap metal to be made by check or money order and mailed to business address of company for whom metal being sold; penalties for violations.
97-17-93.	Entering lands of another without permission; enforcement; relation to other statutes; dismissal of prosecution.

§ 97-17-1. Arson; first degree; burning dwelling house or out-building.

JUDICIAL DECISIONS

8. Miscellaneous.

Trial court did not err by imposing sentences of five years for conspiracy, 25 years for burglary of a dwelling, five years for grand larceny, and 20 years for first degree arson, as these were all the maximum sentences allowed for these crimes. *McCollins v. State*, 952 So. 2d 305 (Miss. Ct. App. 2007).

In a case where defendant was convicted of several crimes relating to the

arson and burglary of a residence, his double jeopardy rights were not violated due to the fact that some of the elements of the crimes overlapped; each of the crimes involved required proof of an additional fact that the other did not. *McCollins v. State*, 952 So. 2d 305 (Miss. Ct. App. 2007).

§ 97-17-4. Forfeiture of property used in commission of arson.

Editor's Note — Section 27-3-4 provides that the terms “Mississippi State Tax Commission,” “State Tax Commission,” “Tax Commission” and “commission” appearing in the laws of this state in connection with the performance of the duties and functions by the Mississippi State Tax Commission, the State Tax Commission or Tax Commission shall mean the Department of Revenue.”

§ 97-17-5. Arson; second degree; other buildings or structures.

JUDICIAL DECISIONS

3. Evidence.

Defendant's admission that he intended to burn a building and that the vent panels and shoe rack were burned was sufficient to establish second degree arson

under Miss. Code Ann. § 97-17-5 because destruction of the building was not required. *Hughes v. State*, 989 So. 2d 434 (Miss. Ct. App. 2008).

§ 97-17-7. Arson; third degree; personal property.

JUDICIAL DECISIONS

2. Sentence.

Motion for post-conviction relief was granted in a case where defendant pled guilty to third degree arson for setting fire to a mattress in his jail cell because his

five-year sentence was in excess of the statutory maximum under Miss. Code Ann. § 97-17-7. *White v. State*, 940 So. 2d 958 (Miss. Ct. App. 2006).

§ 97-17-13. Arson; willfully or negligently firing woods, marsh, meadow, etc.; restitution of fire suppression costs.

Cross References — Imposition and collection of separate laboratory analysis fee in addition to any other assessments and costs imposed by statute on every individual

convicted of a felony in a case where Crime Laboratory provided forensic science or laboratory services in connection with the case, see § 45-1-29.

§ 97-17-23. Burglary; breaking and entering inhabited dwelling; home invasion.

(1) Every person who shall be convicted of breaking and entering the dwelling house or inner door of such dwelling house of another, whether armed with a deadly weapon or not, and whether there shall be at the time some human being in such dwelling house or not, with intent to commit some crime therein, shall be punished by commitment to the custody of the Department of Corrections for not less than three (3) years nor more than twenty-five (25) years.

(2) Every person who shall be convicted of violating subsection (1) under circumstances likely to terrorize any person who is actually occupying the house at the time of the criminal invasion of the premises shall be punished by imprisonment in the custody of the Department of Corrections for not less than ten (10) years nor more than twenty-five (25) years.

SOURCES: Codes, 1906, § 1067; Hemingway's 1917, § 795; 1930, § 811; 1942, § 2037; Laws, 1996, ch. 519, § 1; Laws, 2008, ch. 307, § 1, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment added (2); and in (1), substituted “commitment to the custody of the Department of Corrections for not less than” for “punished by imprisonment in the Penitentiary not less than.”

JUDICIAL DECISIONS

1. In general.
2. Sufficiency of evidence.
- 2.1. — Invited entry.
3. Indictments.
4. Dwelling house of another.
- 4.5. Jury instructions.
5. Sentence.
6. Intent.
7. New trial denied.

1. In general.

In a case where defendant was convicted of several crimes relating to the arson and burglary of a residence, his double jeopardy rights were not violated due to the fact that some of the elements of the crimes overlapped; each of the crimes involved required proof of an additional fact that the other did not. *McCollins v. State*, 952 So. 2d 305 (Miss. Ct. App. 2007).

Burglary conviction was upheld where acquittal on armed robbery charges did

not invoke double jeopardy concerns because defendant was not previously tried for either of the charges and because the burglary charge did not contain the same elements, such as exhibiting a deadly weapon and putting the victim in fear; similarly, the burglary included elements not found in armed robbery, such as breaking and entering. *Smallwood v. State*, 930 So. 2d 448 (Miss. Ct. App. 2006).

2. Sufficiency of evidence.

Defendant's conviction for burglary was supported by sufficient evidence because defendant's theory of an unidentified third man was presented to the jury, but the jury rejected it, and defendant's continued flight evidenced a guilty conscience; defendant's tattoos were consistent with an officer's observation of the man who fled the scene, and the evidence of his heavy, dark tattooing provided the jury with a

basis to resolve any inconsistency in the officer's testimony. *Dison v. State*, 61 So. 3d 975 (Miss. Ct. App. 2011).

There was insufficient evidence to adjudicate a juvenile a delinquent child for the act of burglary, a violation of Miss. Code Ann. § 97-17-23(1), where there was no evidence that the juvenile broke and entered the dwelling house, or had any intent to commit any crime therein; thus, neither element of burglary was proven beyond a reasonable doubt. *C.K.B. v. Harrison County Youth Court*, 36 So. 3d 1267 (Miss. 2010).

Defendant's convictions for house burglary, aggravated assault, armed robbery, and auto theft were proper because the evidence was sufficient. In part, defendant severely beat the victim, demanded that she give him her purse, and then took her purse, a gun, and a set of keys to the victim's vehicle. The victim later identified defendant, based upon her own independent recollection, in a photographic lineup. *Brunner v. State*, 37 So. 3d 645 (Miss. Ct. App. 2009), writ of certiorari denied by 36 So. 3d 455, 2010 Miss. LEXIS 323 (Miss. 2010).

Where defendant was convicted of burglary after breaking into the home of a woman whom he had dated and who told defendant that she did not want to see him again, the jury verdict finding defendant guilty of burglary was not against the weight of the evidence because, although defendant claimed that the window through which he allegedly climbed was too small to accommodate his size, the jury saw photographs of the window and the resolution of factual disputes was within its province. Further, officers found a chair outside that had been placed in front of the window through which defendant allegedly climbed, the screen looked as if it had been torn off or pried open, defendant was found near the victim's home, and as he was arrested, defendant stated that he was just trying to get the victim's attention. *Alesich v. State*, 26 So. 3d 1080 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 52 (Miss. 2010).

Along with the testimony of the victim and codefendant, the jury also was presented with the testimony of multiple

sheriff's deputies, forensic analysts, and with that of a witness, who stated that defendant admitted to him his involvement in the crimes; after hearing all the evidence and being adequately instructed on the applicable law, the jury rendered its decision in due course, and any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. *Christmas v. State*, 10 So. 3d 413 (Miss. 2009).

Defendant's conviction for burglary of a dwelling, in violation of Miss. Code Ann. § 97-17-23(1), was supported by the evidence because defendant crashed through a glass window and advanced briskly upon one victim with hands raised, in what was described as a threatening gesture; hence, the evidence was sufficient to infer that defendant intended to commit an assault under Miss. Code Ann. § 97-3-7(1). *Walker v. State*, 21 So. 3d 663 (Miss. Ct. App. 2009), writ of certiorari denied by 20 So. 3d 680, 2009 Miss. LEXIS 578 (Miss. 2009).

Evidence as sufficient to support defendant's convictions of burglary, kidnapping, and sexual battery where the father of the two-year-old victim testified that he went to pick up his girlfriend from work and left his children secured in their home, that he encountered the 17-year-old defendant while en route and told him where he was going, that he discovered upon his return that his home had been broken into and that his daughter was missing, that he found defendant with his daughter in an abandoned structure nearby, and that, upon examination, the girl's genital area was red, bleeding, and scratched and where a physician who examined the victim testified that the girl's vagina was red, swollen, and irritated but that there was no evidence of infection as the cause. Because the two-year-old victim was too short to have unlocked the door to the family home by herself and had never walked out of the home unassisted, the evidence permitted the jury to reasonably infer that defendant had broken into the family residence, removed the victim therefrom without her father's permission, and sexually assaulted her. *Moton v. State*, 999 So. 2d 1287 (Miss. Ct. App. 2009).

Reasonable jurors could have found beyond a reasonable doubt that defendant kicked in the victim's door where there was no evidence that the victim invited defendant or the unidentified man in her home, and every reasonable inference arising from defendant's actions and words immediately prior to the breaking in of the door would support the conclusion that it was indeed defendant who did so. *Hope v. State*, 992 So. 2d 666 (Miss. Ct. App. 2008).

There was no merit to defendant's claim that a trial court peremptorily found him guilty of burglary by prohibiting him from arguing self-defense where the underlying crime that he was charged with to elevate his murder charge to capital murder under Miss. Code Ann. § 97-3-19(2)(e) was burglary under Miss. Code Ann. § 97-17-23, and Mississippi adhered to the common law rule that an aggressor was precluded from pleading self-defense. As a result, the trial court did not err in denying defendant's attempt to argue self-defense at trial. *Beale v. State*, 2 So. 3d 693 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 90 (Miss. 2009).

Evidence was insufficient to support defendant's burglary conviction where neither a theft from an open, freestanding structure nor a possible entry of a free-standing shed satisfied the elements of Miss. Code Ann. § 97-17-23 (Rev. 2006), the shed did not meet the Miss. Code Ann. § 97-17-31 (Rev. 2006) definition of dwelling house, and there was no breaking and entering involved in the open carport. *Jefferson v. State*, 977 So. 2d 431 (Miss. Ct. App. 2008).

Evidence was sufficient to find defendant committed a burglary in a capital murder case as there was a pry mark on the front door, the front door was left ajar, a television was missing, and drawers were left open, and defendant was found in possession of the victim's personal property shortly after the burglary. Evidence also showed that defendant broke into the victim's house, killed her, and stole some of her personal belongings because he desired money to purchase drugs, and further testimony established that he sold the television and used the proceeds to

purchase crack. *Young v. State*, 981 So. 2d 308 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 206 (Miss. 2008).

Although victims could not positively identify defendant as a second gunman who entered their apartment, they were able to provide police with a description, a stocking cap, clothing, and a gun; a reasonable jury could have found defendant guilty of burglary and robbery beyond a reasonable doubt. *Guyton v. State*, 962 So. 2d 722 (Miss. Ct. App. 2007).

State presented sufficient evidence to convict defendant of burglary of a dwelling, a violation of Miss. Code Ann. § 97-17-23, given the victim's recognition of defendant as the person in her house, defendant's admission that he was in the house, and the testimony that the victim's purse and money were missing after defendant fled her house. *Parker v. State*, 962 So. 2d 25 (Miss. 2007).

Lower court, which denied appellant's motions for new trial and judgment notwithstanding the verdict, did not err in finding that there was sufficient evidence to convict appellant of burglary of a dwelling where appellant confessed to the crime and appellant was found in possession of items stolen from the burglarized home within an hour of the robbery when he tried to pawn the stolen goods at a pawn shop. *Hill v. State*, 952 So. 2d 326 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 322 (Miss. 2007).

Where the suspect broke into a locked basement in the doctor's house and stole \$6,000 in pre-1959 currency, defendant was observed in a travel agency spending strange-looking currency printed prior to 1959, and defendant was a frequent guest in the doctor's home and told a friend that he had taken the money from the doctor's home; the direct and circumstantial evidence was legally sufficient to support defendant's conviction of burglary and larceny of a dwelling under Miss. Code Ann. § 97-17-23. *Sandefur v. State*, 952 So. 2d 281 (Miss. Ct. App. 2007).

Evidence was sufficient to support defendant's conviction of burglary of a dwelling because: (1) there was evidence that defendant entered an outer door and then

an interior door to access the victim's living area; (2) the victim testified that both the outer and interior doors had been locked when she went to sleep that night; and (3) the inner door bore signs of having been forced open. *Magee v. State*, 966 So. 2d 173 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

Evidence was sufficient to support a guilty verdict for attempted burglary because, inter alia: (1) the victim testified that she heard someone removing the screen from her bedroom window and breathing heavily; (2) once the scene was investigated by the victim and the officers, the screen was found removed from the window; and (3) the victim testified to having seen defendant in her backyard shortly after hearing the window screen tampering; thus, the trial court did not err in denying defendant's motion for a directed verdict, his request for a peremptory jury instruction, and his motion for a judgment notwithstanding the verdict. *Brown v. State*, 961 So. 2d 720 (Miss. Ct. App. 2007).

2.1. — Invited entry.

Motion for a directed verdict was properly denied in a case involving burglary of a dwelling under Miss. Code Ann. § 97-17-23 because there was sufficient evidence to contradict defendant's assertion that he was invited into a victim's apartment; police noted a shoe print on the front door of the apartment near the knob, and the door frame was cracked. Even if he was invited into the apartment, the breaking and entering element still applied to the victim's bedroom door; the victim testified defendant put his fist into it, there was a hole in that door, and there appeared to be blood smeared on it as well. *Jenkins v. State*, 995 So. 2d 839 (Miss. Ct. App. 2008).

3. Indictments.

Defendant's capital murder conviction under Miss. Code Ann. § 97-3-19(2)(e) was reversed where his indictment was insufficient to charge him with capital murder or burglary because it failed to assert the underlying offense that comprised the burglary; it also failed to charge him with murder or manslaughter where it omitted

the term "unlawfully" or the phrase "without the authority of law." *Jackson v. State*, — So. 3d —, 2010 Miss. LEXIS 170 (Miss. Apr. 1, 2010).

Jury instruction did not amend the indictment charging defendant with burglary because the indictment charged defendant with breaking into the victim's dwelling, intending to steal the victim's property, while the jury instruction tracked the statutory language and indicated that burglary was the unauthorized entry into the home of another with the intent to commit a crime therein. Because theft was a crime, the indictment properly notified defendant of the crime with which he was charged, and the jury was properly instructed. *Alesich v. State*, 26 So. 3d 1080 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 52 (Miss. 2010).

Post-conviction relief was denied in a case where a plea was entered to burglary of a dwelling under Miss. Code Ann. § 97-17-23 because the record showed that defendant was indicted for this charge; all charges were contained in the same indictment and all offenses were part of a related series of events. *Robertson v. State*, 959 So. 2d 597 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was denied on the basis that an indictment was flawed because this issue was not preserved for review; notwithstanding the bar, the issue was meritless because the indictment stated that a crime occurred "at a certain dwelling owned and occupied," which was sufficient to reflect a burglary of an occupied dwelling, and the transcript of the guilty plea showed that defendant was pleading guilty to this crime, and that he knowing, understanding, freely, and voluntarily entered a plea to such. *Ausbon v. State*, 959 So. 2d 592 (Miss. Ct. App. 2007).

Where defendant was invited to a doctor's home where he stole money, he was properly indicted and convicted of burglary under Miss. Code Ann. § 97-17-23, because § 97-17-23, by its plain wording, applies to "every person"; an invited guest is a person, and therefore a guest falls within the ambit of § 97-17-23. *Sandefer v. State*, 952 So. 2d 281 (Miss. Ct. App. 2007).

Indictment against defendant described the charge of attempted burglary by citing the burglary statute, providing the details of the alleged attempted burglary, and supplying the details concerning the failure to complete the burglary; thus, the indictment against defendant stated the essential facts, and fully notified him of the nature and cause of the charges brought against him, and therefore the trial court did not err in denying the motion to quash the indictment. *Brown v. State*, 961 So. 2d 720 (Miss. Ct. App. 2007).

Defendant was originally indicted for attempted breaking and entering, but the indictment was properly amended when the amendment was one of form, not substance, and defendant had notice; had the original indictment stated “Attempted Burglary, Miss. Code Ann. § 97-1-7” or failed to provide “Burglary of a Dwelling, Miss. Code Ann. § 97-17-23,” then unquestionably the amendment would have been one of substance rather than form, and the supreme court would have been compelled to reverse the trial court’s conviction and sentence, but this indictment, however, was styled and read “Burglary of a Dwelling, Miss. Code Ann. § 97-17-23.” *Spears v. State*, 942 So. 2d 772 (Miss. 2006).

Burglary conviction under Miss. Code Ann. § 97-17-23 was upheld where acquittal on armed robbery charges, brought under Miss. Code Ann. § 97-3-79, did not invoke the doctrine of merger because it was not, as alleged, impossible for defendant to have committed the armed robbery without first committing the burglary. *Smallwood v. State*, 930 So. 2d 448 (Miss. Ct. App. 2006).

4. Dwelling house of another.

Trailer which was broken into was a dwelling house, pursuant to Miss. Code Ann. § 97-17-23, because, while the trailer had other purposes as a shop and office, this fact did not prevent the trailer from being a dwelling. The resident had personal possessions at the trailer and the intent to live there, even if not full time. *Kirkwood v. State*, 53 So. 3d 7 (Miss. Ct. App. 2010), affirmed in part by, reversed by, remanded in part by 52 So. 3d 1184, 2011 Miss. LEXIS 36 (Miss. 2011).

Motion for a directed verdict was properly denied in a case involving burglary of a dwelling under Miss. Code Ann. § 97-17-23 because defendant did not show that he was a resident of a victim’s apartment; defendant’s name was not listed on any of the bills associated with the apartment, and he did not provide her with financial support. Even though he was a frequent invited guest, this did not rise to the level of being an actual dweller in the apartment. *Jenkins v. State*, 995 So. 2d 839 (Miss. Ct. App. 2008).

Where a hunting cabin was fully furnished and had food items, cooking supplies, appliances, and other living comforts and necessities, it constituted a dwelling under Miss. Code Ann. § 97-17-23; therefore, post-conviction relief was denied because defendant was properly charged with burglary of a dwelling, and no evidence was presented by the owners of such due to the fact that defendant entered a guilty plea. *Young v. State*, 952 So. 2d 1031 (Miss. Ct. App. 2007).

4.5. Jury instructions.

When there was direct evidence that a burglary had been committed but only circumstantial evidence that defendant was the burglar, defendant was entitled, in the absence of a circumstantial evidence instruction, to a two-theory instruction to the jury on what to do when the record supported two or more hypotheses of the crime committed. *McInnis v. State*, 61 So. 3d 872 (Miss. 2011).

Defendant was entitled to a circumstantial evidence instruction on charges of house burglary and grand larceny. Defendant’s testimony that he tried to persuade friends not to commit the burglary and an officer’s testimony that defendant was driving a stolen van in which stolen items were found was circumstantial, and no eyewitnesses were presented. *Kirkwood v. State*, 52 So. 3d 1184 (Miss. 2011).

5. Sentence.

Neither the trial court’s decision to sentence defendant to the maximum amount allowed by Miss. Code Ann. § 97-17-23, nor its subsequent decision to deny his plea-withdrawal request was an abuse of discretion because prior to accepting defendant’s guilty plea, the trial court thor-

oughly queried him with regard to the voluntariness of his plea, carefully explained to him that whatever sentencing recommendation the State offered would not have to be accepted, and informed him that the trial court could impose any sentence allowed by law; defendant willfully acknowledged that he fully understood that the State's promise to recommend a sentence carried with it no guarantee that its recommendation would bind the trial court to a particular sentence upon a plea of guilty. *Burrough v. State*, 9 So. 3d 368 (Miss. 2009).

In a case where defendant was sentenced to eight years in prison with five years of post-release supervision after a guilty plea was entered to the crime of attempted burglary of a dwelling, a post-conviction relief motion was properly dismissed without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) because there was no ineffective assistance of counsel where jurisdiction was included in an indictment, the charges were not contradictory, an attempt charge was appropriate, and appellant inmate's other self-serving arguments were wholly unsupported by the record. Moreover, a sentence was not illegal since a suspended sentence was not required in addition to post-release supervision, the sentence imposed was within the range permitted, and the inmate was not misinformed regarding his appellate rights. *McKinney v. State*, 7 So. 3d 291 (Miss. Ct. App. 2008).

Motion for postconviction relief was properly dismissed without an evidentiary hearing in a case where a guilty plea was entered to the charge of burglary of an occupied dwelling because defendant offered no proof of what advice he was given about parole, other than the assertions made in the motion, and he was not eligible for such due to his conviction; also, defendant was told by a trial court that he was required to serve the full term of his sentence when he entered a guilty plea. *Edge v. State*, 962 So. 2d 81 (Miss. Ct. App. 2007).

Motion for post-conviction relief was summarily dismissed since defendant, who was 65 years old and had no prior record, was unable to show that his sentences for burglary and aggravated as-

sault, which were within the ranges in Miss. Code Ann. § 97-17-23 and Miss. Code Ann. § 97-3-7 were grossly disproportionate; he could have received 45 years if the maximum terms had been run consecutively, and the facts showed that he broke into a house wielding a pistol and beat a victim. *Denton v. State*, 955 So. 2d 398 (Miss. Ct. App. 2007).

Defendant's sentence of 25 years' imprisonment for burglary of a dwelling was not illegal as the crime carried a maximum sentence of 25 years under Miss. Code Ann. § 97-17-23; defendant was well aware of the sentence the trial court would impose upon him as a result of his guilty plea. *Martin v. State*, 954 So. 2d 535 (Miss. Ct. App. 2007).

Appellant was properly sentenced pursuant to Miss. Code Ann. § 99-19-81 as a habitual offender following an attempted burglary conviction pursuant to Miss. Code Ann. § 97-17-23 because the trial court did not err in admitting his prior felony convictions, after analyzing them under Miss. R. Evid. 403; they were allowed by Miss. R. Evid. 404(b) as appellant's intent was greatly in issue. *Carter v. State*, 953 So. 2d 224 (Miss. 2007).

Trial court did not err by imposing sentences of five years for conspiracy, 25 years for burglary of a dwelling, five years for grand larceny, and 20 years for first degree arson, as these were all the maximum sentences allowed for these crimes. *McCollins v. State*, 952 So. 2d 305 (Miss. Ct. App. 2007).

Defendant's sentences of 30 years and 25 years in prison for his convictions of rape and burglary of a dwelling, to be served consecutively, did not constitute cruel and unusual punishment because the trial court imposed sentences within the statutory limits for the crimes, and a threshold comparison of defendant's sentence with his crimes did not raise an inference of gross disproportionality that would trigger the Solem proportionality analysis. *Magee v. State*, 966 So. 2d 173 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

Defendant's sentence of 20 years in prison, with 10 years to be suspended and five years of post-release probation, for

one count of burglary of an occupied dwelling was not grossly disproportionate where he had been involved in other domestic disturbances prior to the one in question; thus, the 20-year sentence was within the statutory guidelines. *Edge v. State*, 945 So. 2d 1004 (Miss. Ct. App. 2007).

Inmate plea bargained for a sentence of 15 years for burglary of a dwelling, the sentence as ordered was 25 years with 15 years in the custody of the Mississippi Department of Corrections and the remaining 10 years under the post-release provisions with a five-year supervision period; the post-release supervision was to be served concurrent to the inmate's suspended sentence, and thus the inmate's sentence of 15 years to be served on a 25-year sentence was consistent with his plea bargain of 15 years. *Craft v. State*, 955 So. 2d 384 (Miss. Ct. App. 2006).

6. Intent.

Despite the state's argument that, as underlying offenses to the four capital murder charges, the burglary and child abuse allegations in the indictment were not "separate crimes," the state still had to prove every element of burglary and child abuse beyond a reasonable doubt, includ-

ing intent, however, petitioner state death row inmate's argument that his defense to the intent element was improperly excluded failed because (1) the jury did find intent in the sentencing phase, after hearing the same evidence; (2) the United States Supreme Court had left to the states the responsibility of defining the elements of crime, including *mens rea*; and (3) neither diminished capacity nor voluntary intoxication were defenses to crimes in Mississippi. *Stevens v. Epps*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), affirmed by 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

7. New trial denied.

Despite contradictory evidence, a motion for a new trial was properly denied in a burglary of a dwelling case because the jury's verdict was not against the overwhelming weight of the evidence and did not result in an unconscionable injustice. The evidence showed that a victim's apartment was entered by force, defendant also entered a bedroom by force, and the victim was punched in the face and suffered injuries inflicted by defendant. *Jenkins v. State*, 995 So. 2d 839 (Miss. Ct. App. 2008).

§ 97-17-29. Burglary; breaking inner door of dwelling by one lawfully in house.

JUDICIAL DECISIONS

2. Other burglary statutes.

Where defendant was a frequent guest in the doctor's home and the evidence showed that the suspect broke into a locked basement in the doctor's house and stole \$6,000 in currency, defendant was properly indicted for burglary under Miss. Code Ann. § 97-17-23; a burglary is committed under § 97-17-23 by one who has

permission to enter the dwelling, and once inside, breaks and enters, without permission, an interior door with intent to commit some crime and the fact that defendant could have been prosecuted under Miss. Code Ann. § 97-17-29 did not mean that a prosecution under § 97-17-23 was illegal. *Sandefur v. State*, 952 So. 2d 281 (Miss. Ct. App. 2007).

§ 97-17-33. Burglary; breaking and entering building other than dwelling; railroad car; vessels; automobiles.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
5. —Variance between indictment and proof.
6. Evidence, generally.
- 7.5. —Of intent.
8. —Of value.
10. —Of possession or disposition of stolen property.
12. —Of prior convictions or other crimes.
16. Conviction.
17. Miscellaneous.

1. In general.

Fact that Miss. Code Ann. § 97-17-33(2) and Miss. Code Ann. § 97-17-43(2) provide harsher penalties for crimes committed in places of worship does not amount to government endorsement of religion; therefore, they do not violate the Establishment Clause. *Dimaio v. State*, 951 So. 2d 581 (Miss. Ct. App. 2006).

2. Indictment.

5. —Variance between indictment and proof.

In a business burglary case, the indictment, despite misspelling the name of the store where the burglary took place, was sufficient. *Cridiso v. State*, 956 So. 2d 281 (Miss. Ct. App. 2006), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 285 (Miss. 2007).

6. Evidence, generally.

In addition to a witness's testimony that she saw defendant on a surveillance video, defendant's conviction for business burglary, pursuant to Miss. Code Ann. § 97-17-33(1), was supported by testimony from the police officers who found stolen stocking caps in defendant's pocket, as well as testimony from two eyewitnesses who identified defendant once he was apprehended. *Smith v. State*, 28 So. 3d 678 (Miss. Ct. App. 2010).

Evidence was sufficient to support defendant's conviction of burglary of a building, given that (1) the jury was entitled to believe whomever's story it found most

credible, (2) a witness testified that he and defendant agreed that the witness would steal a public address (PA) system for defendant in return for other goods, (3) defendant drove the witness to the office where the burglary occurred and they later returned to defendant's house with the stolen goods, (4) the PA was eventually recovered from defendant's mother's house, and (5) the witness's version of events was consistent with the testimony of a deputy; the court could not find that allowing defendant's conviction to stand sanctioned an unconscionable injustice. *Thompson v. State*, 995 So. 2d 831 (Miss. Ct. App. 2008).

Evidence was sufficient to sustain a burglary conviction where defendant was seen near the burglarized business beforehand, the keys to the stolen truck were missing from the business, defendant was in possession of the stolen truck's keys, his explanation for his possession of the stolen truck, that it was his uncle's truck, was demonstrably false as the vehicle identification number clearly showed that the truck belonged to the burglarized business, and the inference to be drawn from defendant's possession of the stolen truck was strong where he was found in possession of the truck only six days after the burglary occurred, the license plate had been replaced by a stolen, out-of-state, license plate, he gave several aliases when confronted by the police, and his explanation for possessing the truck was demonstrably false. *Presley v. State*, 994 So. 2d 191 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 652 (Miss. 2008).

Defendant's motions for a directed verdict and judgment notwithstanding the verdict were denied in a case alleging the burglary of a storehouse because the evidence was sufficient for the conviction; police identified defendant through his mannerisms, even though a towel was covering his face, clothes similar to the ones worn were found at the residence of

defendant's girlfriend, a similar towel was found, and a large amount of cash was discovered. *Jackson v. State*, 943 So. 2d 746 (Miss. Ct. App. 2006).

Evidence was sufficient to sustain a conviction for business burglary because defendant was found in the proximity of the store shortly after the burglary was discovered, over 90 cartons of cigarettes were found in defendant's vehicle, and the cartons matched nearly exactly the inventory taken from the store. *Cridiso v. State*, 956 So. 2d 281 (Miss. Ct. App. 2006), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 285 (Miss. 2007).

7.5. —Of intent.

Trial court properly denied defendant's motion for a directed verdict during a trial for burglary of a business, in violation of Miss. Code Ann. § 97-17-33(1), because the evidence showed that defendant entered a meat processing business with the unlawful intent to steal meat; even though the back door of the business was left open during deer hunting season so that customers could leave their field-dressed deer in the cooler, defendant entered with a purpose outside of the owner's consent. *Fulgham v. State*, 12 So. 3d 558 (Miss. Ct. App. 2009).

For purposes of burglary of an automobile, there was sufficient evidence for the jury to properly infer that defendant had the intent to steal when he broke into and entered the automobile in question because the evidence showed that: (1) after examining the passenger side, he found nothing to his liking; (2) he proceeded to the driver's side to continue his search; (3) when confronted by the owner's husband, the defendant neither apologized for being inside the automobile, nor explained that he thought it belonged to someone else; and (4) instead, the defendant refused to exit and informed the husband that he was taking the automobile. *Riley v. State*, 11 So. 3d 751 (Miss. Ct. App. 2008), writ of certiorari dismissed by 2009 Miss. LEXIS 301 (Miss. June 25, 2009).

8. —Of value.

For purposes of burglary of an automobile, the State did not fail to present evidence that the automobile in question contained anything of value because the

jury could have reasonably inferred that the automobile contained at least two seats, a steering wheel, a gear shift, acceleration and brake pedals, and other items necessary for operation of the automobile. *Riley v. State*, 11 So. 3d 751 (Miss. Ct. App. 2008), writ of certiorari dismissed by 2009 Miss. LEXIS 301 (Miss. June 25, 2009).

10. —Of possession or disposition of stolen property.

Trial court did not err in denying defendant's motion for a directed verdict because the evidence was sufficient to support a conviction for business burglary, in violation of Miss. Code Ann. § 97-17-33(1); the State presented evidence that fans and a grill found in defendant's truck were the property of a mental health center. *McMillan v. State*, 6 So. 3d 444 (Miss. Ct. App. 2009).

12. —Of prior convictions or other crimes.

Defendant's conviction for burglary in violation of Miss. Code Ann. § 97-17-33(1) was inappropriate because the prosecutor impermissibly used defendant's prior conviction for attempted grand larceny as evidence of defendant's predisposition to steal to prove the element of intent of the indicted offense. Using the evidence for such a purpose ran afoul of the prohibition on the use of predisposition evidence found in Miss. R. Evid. 404(a). *Robinson v. State*, 42 So. 3d 598 (Miss. Ct. App. 2010).

16. Conviction.

Where the evidence showed that defendant approached a vehicle and looked inside before approaching a second vehicle, looking inside, breaking its window, and fleeing after the vehicle's alarm sounded, defendant was not entitled to a jury instruction on the defense of abandonment because it was extremely likely that defendant would have burglarized the second vehicle if its car alarm had not sounded. Because the burglary would have been completed if defendant had not been interrupted by the car alarm, the trial judge committed no error in refusing to allow the abandonment instruction, as it was not supported by the evidence. *Hawkins v. State*, 11 So. 3d 123 (Miss. Ct.

App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 285 (Miss. 2009).

Evidence was sufficient to convict defendant of attempted burglary of an automobile where it showed that defendant approached a vehicle and looked inside before approaching a second vehicle, looking inside, breaking its window, and fleeing after the vehicle's alarm sounded. *Hawkins v. State*, 11 So. 3d 123 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 285 (Miss. 2009).

17. Miscellaneous.

Evidence was sufficient to sustain a conviction for auto burglary because defendant was found hiding in the victim's vehicle shortly after the crime with no reasonable explanation for being there, he was lying out of sight, he was breathing hard and sweating, and a police officer had seen two men running in the area. *Qualls v. State*, 947 So. 2d 365 (Miss. Ct. App. 2007).

ATTORNEY GENERAL OPINIONS

If a person is granted bail by a municipal court on a charge of aggravated assault and while out on bail a justice court finds probable cause that the person has committed commercial burglary, the justice court should revoke bail for the aggravated

assault charge and shall order the person detained, without bail, on the commercial burglary charge, pending trial on the aggravated assault charge. Turnage, June 26, 2006, A.G. Op. 06-0246.

§ 97-17-41. Grand larceny; second or subsequent offense of felonious taking of motor vehicle; penalties.

JUDICIAL DECISIONS

1. In general.
2. Larceny.
4. Embezzlement.
14. Evidence.
15. —Sufficiency.
17. Instructions, generally.
19. —Circumstantial evidence.
24. Sentence and punishment.

1. In general.

Evidence was sufficient to support defendant's conviction for grand larceny, pursuant to Miss. Code Ann. § 97-17-41(1), because the jury could certainly infer from photographs and the owner's testimony that the vehicle taken by defendant was worth at least \$ 500. *Kirkwood v. State*, 53 So. 3d 7 (Miss. Ct. App. 2010), affirmed in part by, reversed by, remanded in part by 52 So. 3d 1184, 2011 Miss. LEXIS 36 (Miss. 2011).

2. Larceny.

Where an employee alleged that the employee was terminated in retaliation

for reporting larceny and federal income tax evasion regarding tip pool distribution at a casino, the McArn exception to the employment-at-will doctrine did not apply, because the employee did not demonstrate that the activities the employee complained of warranted the imposition of criminal penalties, as opposed to mere civil penalties. *Kyle v. Circus Circus Miss., Inc.*, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 59050 (N.D. Miss. June 15, 2010), affirmed by 430 Fed. Appx. 247, 2011 U.S. App. LEXIS 8834, 32 I.E.R. Cas. (BNA) 285 (5th Cir. Miss. 2011).

4. Embezzlement.

State failed to prove the elements of embezzlement in violation of Miss. Code Ann. § 97-23-19 beyond a reasonable doubt and thus the trial court erred in denying defendant's motion for a directed verdict; in order to prove embezzlement, the State had to provide evidence of the following: (1) a company owned the car in question, (2) the car was lawfully en-

trusted to defendant, and (3) defendant wrongfully converted the vehicle to his own use, and while the State established car ownership by the company given the vehicle identification number, the State did not prove that defendant was entrusted with the vehicle, given that (1) defendant did not have permission to take company vehicle off the lot just by being an employee of the company, (2) the car belonged to a different location where defendant was never employed, and (3) defendant did not possess a valid driver's license, which prohibited him from lawfully driving company vehicles as part of his job. At best, the evidence might have shown the actual theft of property, but it did not prove embezzlement, and the court reversed and rendered. *Lockett v. State*, 989 So. 2d 995 (Miss. Ct. App. 2008).

14. Evidence.

In a case where defendant was convicted of several crimes relating to the arson and burglary of a residence, his double jeopardy rights were not violated due to the fact that some of the elements of the crimes overlapped; each of the crimes involved required proof of an additional fact that the other did not. *McCollins v. State*, 952 So. 2d 305 (Miss. Ct. App. 2007).

15. —Sufficiency.

Defendant's conviction for grand larceny was appropriate because an eyewitness testified that he had seen defendant remove the bag of tools from the victim's trunk and carry them away; another eyewitness picked defendant out of a photo line up with no hesitation; two officers testified that defendant was carrying the black and gold bag of tools when approached on the street; and the evidence was sufficient for a reasonable juror to have found that the value of the stolen tools was more than \$500. *Gunn v. State*, 56 So. 3d 568 (Miss. 2011).

Defendant's conviction for grand larceny in violation of Miss. Code Ann. § 97-17-41(1)(a) was appropriate because one of the victims testified that one seven-piece socket set cost \$150. Based on the victim's testimony regarding the rest of the stolen items, a jury could have reason-

ably inferred that the rest of the tools had a fair market value greater than \$100, for a total over \$250. *Williams v. State*, 994 So. 2d 821 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 642 (Miss. 2008).

Evidence was sufficient to support a grand larceny conviction where defendant was found in possession of the truck only six days after it was stolen without a credible explanation as to why he had possession, and he was seen several hundred yards away from the business where the truck was kept the night before it was taken. *Presley v. State*, 994 So. 2d 191 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 652 (Miss. 2008).

In a grand larceny case, the evidence was legally sufficient to support a conviction based on the testimony of the witnesses that defendant was the person that stole property and ran from police; moreover, defendant was near the abandoned stolen property with fresh mud on his shoes and no credentials to be where he was. *Easterling v. State*, 963 So. 2d 49 (Miss. Ct. App. 2007).

17. Instructions, generally.

19. —Circumstantial evidence.

Defendant was entitled to a circumstantial evidence instruction on charges of house burglary and grand larceny. Defendant's testimony that he tried to persuade friends not to commit the burglary and an officer's testimony that defendant was driving a stolen van in which stolen items were found was circumstantial, and no eyewitnesses were presented. *Kirkwood v. State*, 52 So. 3d 1184 (Miss. 2011).

24. Sentence and punishment.

In a case in which defendant had been sentenced to 10 years of imprisonment as a habitual offender after violating Miss. Code Ann. § 97-23-93, defendant unsuccessfully argued that her sentence was unconstitutional as it exceeded the maximum sentence allowed by law. As she was a habitual offender, the circuit court was required under Miss. Code Ann. § 99-19-81 to impose the maximum sentence for grand larceny, which, under Miss. Code Ann. § 97-17-41, was 10 years and a

fine of \$ 10,000. *Williams v. State*, 24 So. 3d 360 (Miss. Ct. App. 2009).

Trial court did not err by imposing sentences of five years for conspiracy, 25 years for burglary of a dwelling, five years

for grand larceny, and 20 years for first degree arson, as these were all the maximum sentences allowed for these crimes. *McCollins v. State*, 952 So. 2d 305 (Miss. Ct. App. 2007).

§ 97-17-42. Taking possession of or taking away a motor vehicle.

(1) Any person who shall, willfully and without authority, take possession of or take away a motor vehicle of any value belonging to another, with intent to either permanently or temporarily convert it or to permanently or temporarily deprive the owner of possession or ownership, and any person who knowingly shall aid and abet in the taking possession or taking away of the motor vehicle, shall be guilty of a felony and shall be punished by commitment to the Department of Corrections for not more than ten (10) years.

(2) Any person convicted under this section who causes damage to any motor vehicle shall be ordered by the court to pay restitution to the owner or owners of the motor vehicle or vehicles damaged.

(3) This section shall not apply to the enforcement of a security interest in a motor vehicle.

(4) Any person who shall be convicted for a second or subsequent offense under this section shall be imprisoned in the Penitentiary for a term not exceeding fifteen (15) years or shall be fined not more than Ten Thousand Dollars (\$10,000.00), or both.

SOURCES: Laws, 1996, ch. 544, § 1; Laws, 2003, ch. 499, § 2; Laws, 2007, ch. 464, § 1, **eff from and after July 1, 2007.**

Amendment Notes — The 2007 amendment, in (1), inserted “of any value,” “with intent ... ownership” and “of the motor vehicle,” and substituted “ten (10) years” for “five (5) years”; added “or vehicles damaged” at the end of (2); in (4), substituted “under this section” for “of taking and carrying away, feloniously, a motor vehicle which is the personal property of another, of any value, shall be guilty of grand larceny, and” and “fifteen (15) years” for “ten (10) years”; and made minor stylistic changes.

JUDICIAL DECISIONS

2. Sufficiency of evidence.
3. Defense of necessity.

2. Sufficiency of evidence.

Defendant's convictions for house burglary, aggravated assault, armed robbery, and auto theft were proper because the evidence was sufficient. In part, defendant severely beat the victim, demanded that she give him her purse, and then took her purse, a gun, and a set of keys to the victim's vehicle. The victim later identified defendant, based upon her own independent recollection, in a photographic

lineup. *Brunner v. State*, 37 So. 3d 645 (Miss. Ct. App. 2009), writ of certiorari denied by 36 So. 3d 455, 2010 Miss. LEXIS 323 (Miss. 2010).

Circuit court properly denied defendant's motion for a new trial based on defendant's argument that the guilty verdicts were based on insufficient evidence and/or were contrary to law or the weight of the evidence because: (1) allowing the conviction for convicted-felon-in-possession-of-firearm charge in violation of Miss. Code Ann. § 97-37-5(1) (Rev. 2006) to

stand would not have been prejudicial to defendant since all of the evidence pointed to defendant, a prior convicted felon, being in possession of a firearm while not under duress, a conclusion that could have been reached by any rational juror; and (2) since there was conflicting testimony in the case, reasonable and fairminded jurors in the exercise of impartial judgment could have reached different conclusions as to the verdict, thus resulting in the appellate court's finding that there was legally sufficient evidence to convict defendant of motor-vehicle theft Miss. Code Ann. § 97-17-42(1) (Rev. 2006). *Davis v. State*, 18 So. 3d 842 (Miss. 2009).

Defendant's conviction for motor vehicle theft was appropriate because the testimony placed defendant in the stolen vehicle during the dealership's summer sale and established that he drove the vehicle off of the auto lot without the authority to do so; although defendant claimed that he was given permission to use the vehicle and his testimony was corroborated by a witness, the jury was the final judge of witness credibility. *Carter v. State*, 963 So. 2d 33 (Miss. Ct. App. 2007).

In a case in which defendant and two accomplices had taken four school buses for the purpose of playing demolition

derby, defendant's argument failed on appeal that insufficient evidence supported his conviction on two counts of taking a motor vehicle because the state failed to identify with sufficient specificity the buses involved in the incident; the state proved that the buses belonged to a school district through the testimony of the investigating officer and through photographs of the buses. *Hendrix v. State*, 957 So. 2d 1023 (Miss. Ct. App. 2007).

3. Defense of necessity.

Defense of necessity to the charge of the motor vehicle theft was supported by the evidence and was not mentioned anywhere else in the jury instructions, and because it was not addressed in jury instructions, defendant suffered an injustice since the denial of that instruction prevented defendant's proof-grounded theory of the case from being presented. Therefore, the failure of the trial judge to instruct the jury on the defense of necessity was not harmless error and could have been the difference between defendant being found guilty of motor-vehicle theft in violation of Miss. Code Ann. § 97-17-42(1) (Rev. 2006), or not, and thus denied defendant his right to a fair trial. *Davis v. State*, 18 So. 3d 842 (Miss. 2009).

§ 97-17-43. Petit larceny defined; penalty.

JUDICIAL DECISIONS

1. In general.

Fact that Miss. Code Ann. § 97-17-33(2) and Miss. Code Ann. § 97-17-43(2) provide harsher penalties for crimes committed in places of worship does not amount

to government endorsement of religion; therefore, they do not violate the Establishment Clause. *Dimaio v. State*, 951 So. 2d 581 (Miss. Ct. App. 2006).

§ 97-17-59. Larceny; stealing timber; restitution.

Cross References — Statute of limitations for larceny of timber, see § 99-1-5

JUDICIAL DECISIONS

2. Evidence held sufficient.

3. Intent.

2. Evidence held sufficient.

Defendant's indictment for violating Miss. Code Ann. § 97-17-59(2) was not

fatally defective because the use of the term "harvest" in the indictment was an adequate replacement for the term "carried away." *Pollard v. State*, 932 So. 2d 82 (Miss. Ct. App. 2006).

There was no substantial doubt as to which statute applied to defendant's case, Miss. Code Ann. § 97-17-59(2) or Miss. Code Ann. § 97-17-81, because the inclusion in defendant's indictment of the phrase "wilfully, unlawfully, and feloniously," and the inclusion of the value of the stolen timber, \$1,226, made it apparent that defendant was charged pursuant to the felony statute; the indictment also alleged a "felonious" intent on defendant's part. *Pollard v. State*, 932 So. 2d 82 (Miss. Ct. App. 2006).

was reversed because use of the word "or" instead of "and" in jury instruction allowed him to be convicted upon proof that he merely cut the property owner's timber or authorized his employees to cut her timber; such a showing alone would be insufficient to sustain a conviction of timber larceny, as the instruction did not account for other elements of the crime, such as intent. *Pollard v. State*, 932 So. 2d 82 (Miss. Ct. App. 2006).

3. Intent.

Defendant's conviction of larceny of timber under Miss. Code Ann. § 97-17-59(2)

§ 97-17-61. Larceny; taking and carrying away certain animals or motor vehicles not amounting to larceny.

JUDICIAL DECISIONS

1. In general.

Court erred in awarding summary judgment to a car dealership in plaintiff's suit for malicious prosecution because a jury could have reasonably found that there was no probable cause for the dealership's initiation of a criminal charge for unau-

thorized use of a motor vehicle; notwithstanding an agreement whereby plaintiff was to return a vehicle if she could not obtain financing, the vehicle at issue was nevertheless placed in her possession by the dealership. *George v. W.W.D. Autos., Inc.*, 937 So. 2d 958 (Miss. Ct. App. 2006).

§ 97-17-62. Larceny; theft of rental property.

(1)(a) It is unlawful to obtain custody of personal property or equipment by trick, deceit, fraud or willful false representation with intent to defraud the owner or any person in lawful possession of the personal property or equipment.

(b) It is unlawful to hire or lease personal property or equipment from any person who is in lawful possession of the personal property or equipment with intent to defraud that person of the rental due under the rental agreement.

(c) It is unlawful to abandon or willfully refuse to redeliver personal property as required under a rental agreement without the consent of the lessor or the lessor's agent with intent to defraud the lessor or the lessor's agent.

(d) A person who violates this subsection (1) shall be guilty of a misdemeanor, punishable as provided in Section 97-17-43, unless the value of the personal property or equipment is of a value of Five Hundred Dollars (\$500.00) or more; in that event the violation constitutes a felony, punishable as provided in Section 97-17-41.

(2)(a) In prosecutions under this section, the following acts are prima facie evidence of fraudulent intent: obtaining the property or equipment under false pretenses; absconding without payment; or removing or attempting to remove the property or equipment from the county without the express written consent of the lessor or the lessor's agent.

(b) Demand for return of overdue property or equipment and for payment of amounts due may be made personally, by hand delivery, or by certified mail, return receipt requested, to the lessee's address shown in the rental contract.

(c) In a prosecution under subsection (1)(c):

(i) Failure to redeliver the property or equipment within five (5) days after hand delivery to or return receipt from the lessee is prima facie evidence of fraudulent intent. Notice that is returned undelivered after mailing to the address given by the lessee at the time of rental shall be deemed equivalent to return receipt from the lessee.

(ii) Failure to pay any amount due which is incurred as the result of the failure to redeliver property after the rental period expires is prima facie evidence of fraudulent intent. Amounts due include unpaid rental for the time period during which the property or equipment was not returned, and include the lesser of the cost of repairing or replacing the property or equipment, as necessary, if it has been damaged or not returned.

SOURCES: Laws, 2007, ch. 489, § 1, eff from and after July 1, 2007.

Cross References — Grand larceny defined, penalties, see § 97-17-43.

Petit larceny defined, penalties, see § 97-17-43.

Larceny under lease or rental agreement, see § 97-17-64.

§ 97-17-65. Looting.

ATTORNEY GENERAL OPINIONS

The term "normal security" is defined according to its common and ordinary acceptance and meaning. It would remain a fact question in each case as to what the meaning of normal security might include. Dunagan, Apr. 6, 2006, A.G. Op. 06-0031.

Since one convicted of the crime of looting may or may not have taken property, looting does not necessarily constitute theft and is not a disenfranchising crime. Loftin, Sept. 6, 2006, A.G. Op. 06-0386.

§ 97-17-67. Malicious mischief.

(1) Every person who shall maliciously or mischievously destroy, disfigure, or injure, or cause to be destroyed, disfigured, or injured, any property of another, either real or personal, shall be guilty of malicious mischief.

(2) If the value of the property destroyed, disfigured or injured is Five Hundred Dollars (\$500.00) or less, it shall be a misdemeanor punishable by a fine of not more than One Thousand Dollars (\$1,000.00) or imprisonment not exceeding twelve (12) months in the county jail, or both.

(3) If the value of the property destroyed, disfigured or injured is in excess of Five Hundred Dollars (\$500.00), it shall be a felony punishable by a fine not exceeding Ten Thousand Dollars (\$10,000.00) or imprisonment in the Penitentiary not exceeding five (5) years, or both.

(4) In all cases restitution to the victim for all damages shall be ordered. The value of property destroyed, disfigured or injured by the same party as part of a common crime against the same or multiple victims may be aggregated together and if the value exceeds One Thousand Dollars (\$1,000.00), shall be a felony.

(5) For purposes of this statute, value shall be the cost of repair or replacement of the property damaged or destroyed.

(6) Anyone who by any word, deed or act directly or indirectly urges, aids, abets, suggests or otherwise instills in the mind of another the will to so act shall be considered a principal in the commission of said crime and shall be punished in the same manner.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 7(2); 1857, ch. 64, art. 202; 1871, § 2709; 1880, § 2919; 1892, § 1209; 1906, § 1287; Hemingway's 1917, § 1019; 1930, § 1049; 1942, § 2281; Laws, 1962, ch. 319; Laws, 1968, ch. 357, § 1; Laws, 2003, ch. 434, § 1; Laws, 2009, ch. 379, § 2, eff from and after July 1, 2009.

Amendment Notes — The 2009 amendment substituted “common crime against the same or multiple victims” for “common crime against multiple victims” in (4).

§ 97-17-68. Coin operated devices; description of offenses and imposition of penalties; prosecution under this section does not bar prosecution or punishment under other statutes.

(1) It shall be unlawful for any person: (a) to willfully open, enter, remove, break into or tamper with any parking meter, coin telephone or other coin-operated vending machine dispensing goods or services with the intent to commit a larceny therefrom; (b) to possess a key or device designed and intended by him to aid in the commission of larceny from any parking meter, coin telephone or other coin-operated vending machine dispensing goods or services; (c) to possess a drawing, print or mold of a key or device designed and intended by him to aid in the commission of larceny from any parking meter, coin telephone or other coin-operated vending machine dispensing goods or services; or (d) to break into or enter any parking meter, coin telephone or other coin-operated vending machine dispensing goods or services with the intent to steal therefrom.

(2) Any person who violates any provision of this section shall be punished upon the first conviction by imprisonment in the county jail or sentenced to hard labor for the county for a period of not more than thirty (30) days, or by a fine of not more than Two Hundred Dollars (\$200.00), or by both such fine and imprisonment. Upon any subsequent conviction, such person shall be punished by imprisonment in the county jail for a period of not less than six (6)

months nor more than one (1) year, or by a fine of not more than Five Hundred Dollars (\$500.00), or by both such fine and imprisonment.

(3) The fact that a person may be subject to prosecution under this section shall not bar his prosecution or punishment under Section 97-17-67 relating to malicious mischief, under the statutes relating to larceny, or under any other statute or ordinance to the extent that such would otherwise be permitted in the absence of this section.

SOURCES: Laws, 1974, ch. 356, §§ 1, 2; Laws, 2009, ch. 379, § 1, eff from and after July 1, 2009.

Amendment Notes — The 2009 amendment substituted “break into or tamper with any parking meter” for “break into, tamper with or damage any parking meter” in (1); and added (3).

§ 97-17-70. Receiving stolen property; dual charges of both stealing and receiving same property not to be brought against single defendant in same jurisdiction; penalties.

(1) A person commits the crime of receiving stolen property if he intentionally possesses, receives, retains or disposes of stolen property knowing that it has been stolen or having reasonable grounds to believe it has been stolen, unless the property is possessed, received, retained or disposed of with intent to restore it to the owner.

(2) The fact that the person who stole the property has not been convicted, apprehended or identified is not a defense to a charge of receiving stolen property.

(3)(a) Evidence that the person charged under this section stole the property that is the subject of the charge of receiving stolen property is not a defense to a charge under this section; however, dual charges of both stealing and receiving the same property shall not be brought against a single defendant in a single jurisdiction.

(b) Proof that a defendant stole the property that is the subject of a charge under this section shall be prima facie evidence that the defendant had knowledge that the property was stolen.

(4) Any person who shall be convicted of receiving stolen property which exceeds Five Hundred Dollars (\$500.00) in value shall be committed to the custody of the State Department of Corrections for a term not exceeding ten (10) years or by a fine of not more than Ten Thousand Dollars (\$10,000.00), or both.

(5) Any person who shall be convicted of receiving stolen property which does not exceed Five Hundred Dollars (\$500.00) in value shall be punished by imprisonment for not more than six (6) months or by a fine of not more than One Thousand Dollars (\$1,000.00), or both.

SOURCES: Laws, 1993, ch. 359, § 1; Laws, 2003, ch. 499, § 4; Laws, 2005, ch. 511, § 1; Laws, 2007, ch. 437, § 1, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment added (3) and redesignated former (3) and (4) as present (4) and (5).

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1. In general.
2. Evidence.
3. Sufficiency of evidence.
4. Instructions.

II. UNDER FORMER § 97-17-69.

19. Indictment.

I. UNDER CURRENT LAW.

1. In general.

Jury instruction on receiving stolen property in a case relating to burglary and larceny of a church was properly denied because no reasonable juror could have found defendant guilty of this offense due to defendant's admission, a co-defendant's testimony, and the items found in defendant's home during the execution of a search warrant. *Dimaio v. State*, 951 So. 2d 581 (Miss. Ct. App. 2006).

2. Evidence.

Certificate of title and a bill of sale that were produced to the State during discovery were admissible into evidence because they were relevant under Miss. R. Evid. 401, as a reasonable juror could conclude that, because defendant produced the fraudulent documents during discovery, he knew the vehicle was stolen. In addition, to authenticate the documents, the State had only to show that the documents were what the State claimed them to be, and defendant offered no objection to their authenticity. *Hayden v. State*, 972 So. 2d 525 (Miss. 2007).

3. Sufficiency of evidence.

Defendant contended that the evidence showed that he stole the motorcycle and trailer and thus the evidence was insufficient to sustain his conviction of receiving stolen property under Miss. Code Ann. § 97-17-70; however, if the statute no longer required that there be evidence that someone else stole the property, then obviously the issue had no merit. *Ezell v. State*, 956 So. 2d 315 (Miss. Ct. App. 2006).

Evidence was sufficient to enable a reasonable juror to conclude that defendant knew or reasonably should have known that the motorcycle and trailer were stolen property because, *inter alia*: (1) on February 14, 2004, the owners told him that their motorcycle and trailer had been stolen; and (2) defendant had been to the owners' house and from where he was standing in their driveway could see the motorcycle and trailer, so he was familiar with them; thus, the evidence was sufficient to sustain defendant's conviction for receipt of stolen property. *Ezell v. State*, 956 So. 2d 315 (Miss. Ct. App. 2006).

Although the sole evidence of the value of the stolen motorcycle and trailer was their original purchase prices, which were, respectively, \$5,600 in 2000 and \$500 plus a trailer in trade, a reasonable jury could have inferred that the motorcycle and trailer had market values in excess of \$500 at the times of their knowing possession by defendant; thus, the evidence was sufficient to sustain defendant's conviction of two counts of receiving stolen property valued in excess of \$500. *Ezell v. State*, 956 So. 2d 315 (Miss. Ct. App. 2006).

Sufficient evidence supported defendant's conviction for receiving stolen property, a truck, in violation of Miss. Code Ann. § 97-17-70(1) as defendant bought the \$35,000 truck for \$12,000, was not given any paperwork, bill of sale or title, and did not purchase a tag or insurance for the truck. *Long v. State*, 933 So. 2d 1056 (Miss. Ct. App. 2006).

4. Instructions.

Trial judge did not err in denying defendant's request for lesser offense instructions on accessory after the fact and/or receiving stolen goods, Miss. Code Ann. §§ 97-17-70 and 97-1-5, as these lesser offenses were separate and distinct from those charged, and there was no evidentiary basis to support the requisite knowledge element for either instruction. *Brazzle v. State*, 13 So. 3d 810 (Miss. 2009).

In a case involving burglary of a business, defendant was not entitled to receive an instruction on misdemeanor receipt of stolen property under Miss. Code Ann. § 97-17-70(4) because the only evidence of the value of stolen property was offered by an owner, and he stated it was worth \$3,500. *Lindsey v. State*, 990 So. 2d 270 (Miss. Ct. App. 2008).

II. UNDER FORMER § 97-17-69.

19. Indictment.

Defendant's indictment for receiving or possessing athletic wear which was stolen

and exceeded a value of over \$500 was sufficient to inform him as to the charges he was facing such that he had a fair opportunity to prepare a defense; it was of no instance that the indictment did not list each individual cap, sweatshirt, or pair of tennis shoes since the purpose of an indictment is to inform defendant, with some measure of certainty, as to the nature of the charges brought against him. *Tucker v. State*, 47 So. 3d 164 (Miss. Ct. App. 2009), reversed by 47 So. 3d 135, 2010 Miss. LEXIS 573 (Miss. 2010).

§ 97-17-71. Receiving stolen property; definitions; scrap metal dealers and other purchasers to keep records of purchases of metal property; content of records; metal property to be held separate and identifiable from other purchases for not less than three (3) business days from date of purchase; inspection by law enforcement personnel; hold notice; recovery of metal property by rightful owner; restitution to dealer by unlawful seller; false statement of ownership; cash transactions for purchase of scrap metal prohibited; failure to maintain appropriate records; interstate transportation of metal property; purchase and possession of metal beer kegs and/or metal syrup tanks generally used by soft drink industry prohibited except in limited circumstances; sales and purchases of bronze memorials prohibited except in limited circumstances; purchase of utility access covers or metal property identified as belonging to political subdivision except in limited circumstances; purchases of metal property from minors prohibited; limitation on hours of purchase; penalties.

(1) For the purposes of this section, the following terms shall have the meanings ascribed in this section:

(a) "Railroad materials" means any materials, equipment and parts used in the construction, operation, protection and maintenance of a railroad.

(b) "Copper materials" means any copper wire, bars, rods or tubing, including copper wire or cable or coaxial cable of the type used by public utilities, common carriers or communication services providers, whether wireless or wire line, copper air conditioner evaporator coil or condenser, aluminum copper radiators not attached to a motor vehicle, or any combination of these.

(c) "Aluminum materials" means any aluminum cable, bars, rods or tubing of the type used to construct utility, communication or broadcasting

towers, aluminum utility wire and aluminum irrigation pipes or tubing. "Aluminum materials" does not include aluminum cans that have served their original economic purpose.

(d) "Law enforcement officer" means any person appointed or employed full time by the state or any political subdivision thereof, or by the state military department as provided in Section 33-1-33, who is duly sworn and vested with authority to bear arms and make arrests, and whose primary responsibility is the prevention and detection of crime, the apprehension of criminals and the enforcement of the criminal traffic laws of this state or the ordinances of any political subdivision thereof.

(e) "Metal property" means materials as defined in this section as railroad track materials, copper materials and aluminum materials and electrical, communications or utility brass, metal covers for service access and entrances to sewers and storm drains, metal bridge pilings, irrigation wiring and other metal property attached to or part of center pivots, grain bins, stainless steel sinks, catalytic converters not attached to a motor vehicle and metal beer kegs. Metal property does not include ferrous materials not listed in this section.

(f) "Person" means an individual, partnership, corporation, joint venture, trust, limited liability company, association or any other legal or commercial entity.

(g) "Personal identification card" means any government issued photographic identification card.

(h) "Photograph" or "photographically" means a still photographic image, including images captured in digital format, that are of such quality that the persons and objects depicted are clearly identifiable.

(i) "Purchase transaction" means a transaction in which a person gives consideration in exchange for metal property.

(j) "Purchaser" means a person who gives consideration in exchange for metal property.

(k) "Record" or "records" means a paper, electronic or other method of storing information.

(l) "Scrap metal dealer" means any person who is engaged, from a fixed location or otherwise, in the business of paying compensation for metal property that has served its original economic purpose, whether or not the person is engaged in the business of performing the manufacturing process by which metals are converted into raw material products consisting of prepared grades and having an existing or potential economic value.

(2) Every scrap metal dealer or other purchaser shall keep an accurate and legible record in which he shall enter the following information for each purchase transaction:

(a) The name, address and age of the person from whom the metal property is purchased as obtained from the seller's personal identification card;

(b) The date and place of each acquisition of the metal property;

(c) The weight, quantity or volume and a general physical description of the type of metal property, such as wire, tubing, extrusions or casting, purchased in a purchase transaction;

(d) The amount of consideration given in a purchase transaction for the metal property;

(e) The vehicle license tag number, state of issue and the make and type of the vehicle used to deliver the metal property to the purchaser;

(f) If a person other than the seller delivers the metal property to the purchaser, the name, address and age of the person who delivers the metal property;

(g) A signed statement from the person receiving consideration in the purchase transaction stating that he is the rightful owner of the metal property or is entitled to sell the metal property being sold;

(h)(i) A scanned copy or a photocopy of the personal identification card of the person receiving consideration in the purchase transaction; or

(ii) If a person other than the seller delivers the metal property to the purchaser, a scanned copy or a photocopy of the personal identification card of the person delivering the metal property to the purchaser; and

(i) A photograph, videotape or similar likeness of the person receiving consideration or any person other than the seller who delivers the metal property to the purchaser in which the person's facial features are clearly visible and in which the metal property the person is selling or delivering is clearly visible.

Such records shall be maintained by the scrap metal dealer or purchaser for not less than two (2) years from the date of the purchase transaction, and such records shall be made available to any law enforcement officer during usual and customary business hours.

(3) The purchaser of metal property must hold the metal property separate and identifiable from other purchases for not less than three (3) business days from the date of purchase. The purchaser shall also photographically capture the metal property in the same form, without change, in which the metal property was acquired, and maintain the photograph for a period of not less than two (2) years. The time and date shall be digitally recorded on the photograph, and the identity of the person taking the photograph shall be recorded. The purchaser shall permit any law enforcement officer to make an inspection of the metal property during the holding period, and of all photographs of the metal property. Any photograph of metal property taken and maintained pursuant to this subsection shall be admissible in any civil or criminal proceeding.

(4) During the usual and customary business hours of a scrap metal dealer or other purchaser, a law enforcement officer, after proper identification as a law enforcement officer, shall have the right to inspect all purchased metal property in the possession of the scrap metal dealer or purchaser.

(5)(a) Whenever a law enforcement officer has reasonable cause to believe that any item of metal property in the possession of a scrap metal dealer or other purchaser has been stolen, a law enforcement officer who has an affidavit from the alleged rightful owner of the property identifying the property with specificity, including any identifying markings, may issue and deliver a written hold notice to the scrap metal dealer or other purchaser.

The hold notice shall specifically identify those items of metal property that are believed to have been stolen and that are subject to the hold notice. Upon receipt of the notice, the scrap metal dealer or other purchaser may not process or remove the metal property identified in the notice from the place of business of the scrap metal dealer or purchaser for fifteen (15) calendar days after receipt of the notice, unless sooner released by a law enforcement officer.

(b) No later than the expiration of the fifteen-day period, a law enforcement officer, after receiving additional substantive evidence beyond the initial affidavit, may issue and deliver a second written hold notice, which shall be an extended hold notice. The extended hold notice shall specifically identify those items of metal property that are believed to have been stolen and that are subject to the extended hold notice. Upon receipt of the extended hold notice, the scrap metal dealer or purchaser may not process or remove the items of metal property identified in the notice from the place of business of the scrap metal dealer or purchaser for fifteen (15) calendar days after receipt of the extended hold notice, unless sooner released by a law enforcement officer.

(c) At the expiration of the hold period or, if extended in accordance with this subsection, at the expiration of the extended hold period, the hold is automatically released, then the scrap metal dealer or purchaser may dispose of the metal property unless other disposition has been ordered by a court of competent jurisdiction.

(d) If the scrap metal dealer or other purchaser contests the identification or ownership of the metal property, the party other than the scrap metal dealer or other purchaser claiming ownership of any metal property in the possession of a scrap metal dealer or other purchaser, provided that a timely report of the theft of the metal property was made to the proper authorities, may bring a civil action in the circuit court of the county in which the scrap metal dealer or purchaser is located. The petition for the action shall include the means of identification of the metal property utilized by the petitioner to determine ownership of the metal property in the possession of the scrap metal dealer or other purchaser.

(e) When a lawful owner recovers stolen metal property from a scrap metal dealer or other purchaser who has complied with this section, and the person who sold the metal property to the scrap metal dealer or other purchaser is convicted of a violation of this section, or theft by receiving stolen property under Section 97-17-70, the court shall order the convicted person to make full restitution to the scrap metal dealer or other purchaser, including, without limitation, attorney's fees, court costs and other expenses.

(6) This section shall not apply to purchases of metal property from any of the following:

(a) A law enforcement officer acting in an official capacity;

(b) A trustee in bankruptcy, executor, administrator or receiver who has presented proof of such status to the scrap metal dealer;

(c) Any public official acting under a court order who has presented proof of such status to the scrap metal dealer;

(d) A sale on the execution, or by virtue of any process issued by a court, if proof thereof has been presented to the scrap metal dealer; or

(e) A manufacturing, industrial or other commercial vendor that generates or sells regulated metal property in the ordinary course of its business.

(7) It shall be unlawful for any person to give a false statement of ownership or to give a false or altered identification or vehicle tag number and receive money or other consideration from a scrap metal dealer or other purchaser in return for metal property.

(8) A scrap metal dealer or other purchaser shall not enter into any cash transactions in payment for the purchase of metal property. Payment shall be made by check issued to the seller of the metal, made payable to the name and address of the seller and mailed to the recorded address of the seller, or by electronic funds transfer. Payment shall not be made for a period of three (3) days after the purchase transaction.

(9) If a person acquiring metal property fails to maintain the records or to hold such materials for the period of time prescribed by this section, such failure shall be prima facie evidence that the person receiving the metal property received it knowing it to be stolen in violation of Section 97-17-70.

(10) It shall be unlawful for any person to transport or cause to be transported for himself or another from any point within this state to any point outside this state any metal property, unless the person or entity first reports to the sheriff of the county from which he departs this state transporting such materials the same information that a purchaser in this state would be required to obtain and keep in a record as set forth in subsection (2) of this section. In such a case the sheriff receiving the report shall keep the information in records maintained in his office as a public record available for inspection by any person at all reasonable times. This section shall not apply to a public utility, as that term is defined in Section 77-3-3, engaged in carrying on utility operations; to a railroad, as that term is defined in Section 77-9-5; to a communication service provider, whether wireless or wire line; to a scrap metal dealer; or to a person identified in subsection (6) as being exempt from the provisions of this section.

(11) It shall be unlawful for a scrap metal dealer or other purchaser to knowingly purchase or possess a metal beer keg, or a metal syrup tank generally used by the soft drink industry, whether damaged or undamaged, or any reasonably recognizable part thereof, on any premises that the dealer uses to buy, sell, store, shred, melt, cut or otherwise alter scrap metal. However, it shall not be unlawful to purchase or possess a metal syrup tank generally used by the soft drink industry if the scrap metal dealer or other purchaser obtains a bill of sale at the time of purchase from a seller if the seller is a manufacturer of such tanks, a soft drink company or a soft drink distributor.

(12) It shall be unlawful to sell to a scrap metal dealer any bronze vase and/or marker, memorial, statue, plaque, or other bronze object used at a cemetery or other location where deceased persons are interred or memorialized, or for any such dealer to purchase those objects, unless the source of the

bronze is known and notice is provided to the municipal or county law enforcement agency where the dealer is located. The notice shall identify all names, letters, dates and symbols on the bronze and a photograph of the bronze shall be attached thereto. Written permission from the cemetery and the appropriate law enforcement agency must be received before any type of bronze described in this subsection may be purchased, processed, sold or melted.

(13) It shall be unlawful for any scrap metal dealer to purchase any manhole cover and other similar types of utility access covers, including storm drain covers, or any metal property clearly identified as belonging to a political subdivision of the state or a municipality, unless that metal property is purchased from the political subdivision, the municipal utility or the manufacturer of the metal. Any purchaser who purchases metal property in bulk shall be allowed twenty-four (24) hours to determine if any metal property prohibited by this subsection is included in a bulk purchase. If such prohibited metal property is included in a bulk purchase, the purchaser shall notify law enforcement no later than twenty-four (24) hours after the purchase.

(14) It shall be unlawful for a scrap metal dealer or other purchaser to purchase metal property from a person younger than eighteen (18) years of age.

(15) Metal property may not be purchased, acquired or collected between the hours of 9:00 p.m. and 6:00 a.m.

(16) Except as provided in this subsection, any person willfully or knowingly violating the provisions of this section shall, upon conviction thereof, be deemed guilty of a misdemeanor, and shall be punished by a fine not to exceed One Thousand Dollars (\$1,000.00) per offense, unless the purchase transaction or transactions related to the violation, in addition to any costs which are, or would be, incurred in repairing or in the attempt to recover any property damaged in the theft of or removal of the metal property, are in aggregate an amount which exceeds Five Hundred Dollars (\$500.00), in which case the person shall be guilty of a felony and shall be imprisoned in the custody of the Department of Corrections for a term not to exceed ten (10) years, fined not more than Ten Thousand Dollars (\$10,000.00), or both. Any person found guilty of stealing metal property or receiving metal property, knowing it to be stolen in violation of Section 97-17-70, shall be ordered to make full restitution to the victim, including, without limitation, restitution for property damage that resulted from the theft of the property.

(17) This section shall not be construed to repeal other criminal laws. Whenever conduct proscribed by any provision of this section is also proscribed by any other provision of law, the provision which carries the more serious penalty shall be applied.

(18) This section shall apply to all businesses regulated under this section without regard to the location within the State of Mississippi.

(19) This section shall not be construed to prohibit municipalities and counties from enacting and implementing ordinances, rules and regulations that impose stricter requirements relating to purchase transactions.

SOURCES: Codes, 1942, § 2249.5; Laws, 1966, ch. 390, §§ 1-3, 1971, ch. 474, §§ 1-5; Laws, 1989, ch. 578, § 1; Laws, 1993, ch. 359, § 2; Laws, 2008, 1st Ex Sess, ch. 29, § 1, eff 60 days after passage (approved June 9, 2008); Laws, 2012, ch. 536, § 1, eff from and after July 1, 2012.

Amendment Notes — The 2008 amendment (ch. 29, 1st Ex Sess) rewrote the section.

The 2012 amendment rewrote (1)(a), which read: “Railroad track materials’ means any rail, switch component, spike, angle bar, tie plate or bolt of the type used in constructing railroads”; inserted “metal covers for service access and entrances to sewers and storm drains, metal bridge pilings, irrigation wiring and other metal property attached to or part of center pivots, grain bins” in the first sentence of (1)(e); and added (13) and redesignated the remaining subsections accordingly.

§ 97-17-71.1. Registration by scrap metal dealers with office of Secretary of State required; penalties for violations; enforcement.

(1)(a) From and after August 7, 2008, it shall be unlawful for any scrap metal dealer or any person who purchases scrap metal, deals in scrap metal, or otherwise engages in the scrap metal business to fail to register with the Secretary of State. All registrations under this section shall expire two (2) years from the date of the registration or the renewal thereof.

(b) The Secretary of State may promulgate and adopt such rules and regulations as are reasonably necessary to carry out the provisions of this section and establish such registration and renewal fees as are adequate to cover the administrative costs associated with the registration program.

(c) The Secretary of State may deny, suspend, revoke or refuse to renew any registration following notice to the applicant or registrant in accordance with the promulgated rules and an opportunity for a hearing for any failure to comply with this section, or for other good cause.

(2) A violation of this section is a misdemeanor punishable by a fine of not less than Five Hundred Dollars (\$500.00) but not to exceed One Thousand Dollars (\$1,000.00) for the first offense. Any person who shall be guilty of any subsequent violations of this section requiring registration shall be guilty of a felony offense and shall be imprisoned in the custody of the Department of Corrections for a term not to exceed three (3) years, fined not more than Five Thousand Dollars (\$5,000.00), or both.

(3)(a) To register or renew registration, the registrant must declare, under penalty of perjury, whether such registrant has ever been convicted of a violation of Section 97-17-71 or convicted of a criminal offense of larceny, burglary or vandalism, where the offense involved metal property as defined in Section 97-17-71.

(b)(i) An applicant who has been convicted of a violation of Section 97-17-71, or who has a conviction for a criminal offense of larceny, burglary or vandalism where such offense involved metal property, shall be prohibited from registering under this section for five (5) years from the date of conviction.

(ii) Any false statement submitted to the Secretary of State for the purpose of unlawfully registering under this section shall be punished as perjury in the manner provided in Section 97-9-61, and a person so convicted shall be disqualified for life from registering as a scrap metal dealer under this section.

(4) The Secretary of State shall immediately report any suspected criminal violation accompanied by all relevant records to the Office of Attorney General and the appropriate district attorney for further proceedings.

(5) The Secretary of State shall have the authority to:

(a) Conduct and carry out criminal background history verification of the information provided by the applicant or registrant and to require the submission of information and forms from the applicant or registrant in order to accomplish the registration duties imposed by this section;

(b) Issue a cease and desist order, with a prior hearing, against the scrap metal dealer or other purchaser alleged to be in violation of this section, directing the person or persons to cease and desist from further illegal activity;

(c)(i) Issue an order against any scrap metal dealer or other purchaser for any violation of this section, imposing an administrative penalty up to a maximum of One Thousand Dollars (\$1,000.00) for each offense. Each violation shall be considered a separate offense in a single proceeding or a series of related proceedings. Any administrative penalty, plus reimbursement for all costs and expenses incurred in the investigation of the violation and any administrative proceedings, shall be paid to the Secretary of State;

(ii) For the purpose of determining the amount or extent of a sanction, if any, to be imposed under paragraph (c) (i) of this subsection, the Secretary of State shall consider, among other factors, the frequency, persistence and willfulness of the conduct constituting a violation of this section or any rule or order hereunder; the number of persons adversely affected by the conduct; and the resources of the person committing the violation;

(d) Bring an action in chancery court to enjoin the acts or practices complained of to enforce compliance with this section or any rule promulgated or order entered hereunder. Upon a proper showing, a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. In addition, upon a proper showing by the Secretary of State, the court may enter an order of rescission or restitution directed to any person who has engaged in any act constituting a violation of any provision of this section or any rule or order hereunder, or the court may impose a civil penalty up to a maximum of One Thousand Dollars (\$1,000.00) for each offense, provided that each violation shall be considered as a separate offense in a single proceeding or a series of related proceedings. The court may not require the Secretary of State to post a bond.

SOURCES: Laws, 2008, 1st Ex Sess, ch. 29, § 2, eff 60 days after passage (approved June 9, 2008.)

§ 97-17-71.2. Scrap metal dealers prohibited from paying cash or making payment of any kind at time of transaction for air conditioner evaporator coil or condenser; scrap metal dealers permitted to purchase air conditioner evaporator coil or condenser only from certain contractors or companies; payment for scrap metal to be made by check or money order and mailed to business address of company for whom metal being sold; penalties for violations.

(1) It is an offense for a scrap metal dealer or other purchaser to pay cash to a person who presents an air conditioner evaporator coil or condenser, in whole or in part, for sale as scrap, or for such dealer to make payment of any kind at the time of the transaction.

(2) Scrap metal described in subsection (1) may only be sold for scrap by an authorized agent, representative or employee of one (1) of the following:

(a) A licensed HVAC contractor who acquired the evaporator coil or condenser in the performance as a contractor as defined in Section 31-3-1;

(b) A company meeting all local or municipal requirements to obtain a permit from that jurisdiction to repair, replace and install HVAC units containing copper evaporator coils or condensers;

(c) Where the jurisdiction does not require a permit to repair, replace and install HVAC units containing copper evaporator coils or condensers, by a company holding a privilege license indicating the business as that of an HVAC installer or repairer; or

(d) A company holding a privilege license indicating the business as that of an HVAC installer or repairer.

(3) The person offering an air conditioner evaporator coil or condenser for sale as scrap on behalf of a company listed in subsection (2) shall have in the person's possession documentation that the company for whom it is being sold is a company described in subsection (2), and that the person selling the evaporator coil or condenser is an authorized agent, representative or employee of that company.

(4) Payment for scrap metal described in subsection (1) must be made by check or money order, mailed to the business address of the company for whom the metal is being sold, and the name of the company must be the payee on the check.

(5)(a) A violation of this section is a misdemeanor punishable by a fine not to exceed One Thousand Dollars (\$1,000.00) per offense.

(b) Nothing in this section shall be construed to preclude a person violating this section from also being prosecuted for any other applicable criminal offense.

SOURCES: Laws, 2008, 1st Ex Sess, ch. 29, § 3, eff 60 days after passage (approved June 9, 2008.)

§ 97-17-81. Trees; cutting or rafting upon lands of another.

JUDICIAL DECISIONS

1. In general.

There was no substantial doubt as to which statute applied to defendant's case, Miss. Code Ann. § 97-17-59(2) or Miss. Code Ann. § 97-17-81, because the inclusion in defendant's indictment of the phrase "wilfully, unlawfully, and feloniously," and the inclusion of the value of the stolen timber, \$1,226, made it apparent that defendant was charged pursuant to the felony statute; the indictment also alleged a "felonious" intent on defendant's part. Pollard v. State, 932 So. 2d 82 (Miss. Ct. App. 2006).

ously," and the inclusion of the value of the stolen timber, \$1,226, made it apparent that defendant was charged pursuant to the felony statute; the indictment also alleged a "felonious" intent on defendant's part. Pollard v. State, 932 So. 2d 82 (Miss. Ct. App. 2006).

§ 97-17-87. Trespass; willful or malicious; penalty; enhanced penalties for willful trespass upon airport operations area.

JUDICIAL DECISIONS

1. In general.

Under the direct remand rule, the evidence was sufficient to uphold a conviction of trespass under Miss. Code Ann. § 97-17-87 (Rev. 2006) given the testimony that

defendant was either a principle or an aider and abetter of the trespass. Jefferson v. State, 977 So. 2d 431 (Miss. Ct. App. 2008).

§ 97-17-93. Entering lands of another without permission; enforcement; relation to other statutes; dismissal of prosecution.

(1) Any person who knowingly enters the lands of another without the permission of or without being accompanied by the landowner or the lessee of the land, or the agent of such landowner or lessee, shall be guilty of a misdemeanor and, upon conviction, shall be punished for the first offense by a fine of Two Hundred Fifty Dollars (\$250.00). Upon conviction of any person for a second or subsequent offense, the offenses being committed within five (5) years of the last offense, such person shall be punished by a fine of Five Hundred Dollars (\$500.00), and may be imprisoned in the county jail for a period of not less than ten (10) nor more than thirty (30) days, or by both such fine and imprisonment. This section shall not apply to the landowner's or lessee's family, guests, or agents, to a surveyor as provided in Section 73-13-103, or to persons entering upon such lands for lawful business purposes.

(2)(a) It shall be the duty of sheriffs, deputy sheriffs, constables and conservation officers to enforce this section.

(b) Such officers shall enforce this section by issuing a citation to those charged with trespassing under this section.

(3) The provisions of this section are supplementary to the provisions of any other statute of this state.

(4) A prosecution under the provisions of this section shall be dismissed upon the request of the landowner, lessee of the land or agent of such landowner or lessee, as the case may be.

SOURCES: Codes, 1892, § 1318; 1906, § 1392; Hemingway's 1917, § 1135; 1930, § 1166; 1942, § 2409; Laws, 1962, ch. 323, § 1; Laws, 1976, ch. 404; Laws, 1978, ch. 417, § 1; Laws, 1984, ch. 504; Laws, 1987, ch. 331; Laws, 1997, ch. 425, § 3; Laws, 2008, ch. 545, § 2, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment, in (1), deleted “not less than One Hundred Fifty Dollars (\$150.00) nor more than” preceding “Two Hundred Fifty Dollars” and “not less than Two Hundred Fifty Dollars (\$250.00) nor more than” preceding “Five Hundred Dollars.”

CHAPTER 19

False Pretenses and Cheats

SEC.

- | | |
|-----------|-------------------------------------------------------------------------------------------------------------------------------------------------|
| 97-19-55. | Bad checks and insufficient funds. |
| 97-19-71. | Fraud in connection with state or federally funded assistance programs; penalty. |
| 97-19-75. | Bad check complaint procedures; restitution procedures. |
| 97-19-85. | Fraudulent use of identity, Social Security number, credit card or debit card number or other identifying information to obtain thing of value. |

§ 97-19-39. Obtaining signature or thing of value with intent to defraud.

JUDICIAL DECISIONS

1. In general.
3. Indictment, generally.
6. —Sufficiency.
8. Burden and degree of proof.

1. In general.

Defendant's motion to quash an indictment charging him with receiving money under false pretenses in violation of Miss. Code Ann. § 97-19-39 was properly denied because the term “person” applied to artificial as well as natural persons and therefore encompassed limited liability companies. *Cater v. State*, 5 So. 3d 391 (Miss. 2009).

3. Indictment, generally.

6. —Sufficiency.

Motion for post-conviction relief was denied in a case where defendant pled guilty to uttering a forgery because a claim that the charge should have been for false

pretenses instead was procedurally barred under Miss. Code Ann. § 99-39-21(1) since the issue was not raised in the plea; despite the bar, the issue was meritless because defendant admitted in the plea colloquy that she knowingly created a fictitious name for use on a bank account and presented a check drawn on that account for payment at a retail store. *Tate v. State*, 961 So. 2d 763 (Miss. Ct. App. 2007).

8. Burden and degree of proof.

Defendant's conviction for false pretenses was supported by sufficient evidence as the evidence showed that, while defendant claimed money from a widow was for repairing siding, the widow testified it was for cleaning gutters that were not cleaned and was ten times the agreed amount. It was up to the jury to decide if her testimony was improbable or contra-

ditory. *Cooper v. State*, 68 So. 3d 741 (Miss. Ct. App. 2011), writ of certiorari denied by 69 So. 3d 9, 2011 Miss. LEXIS 404 (Miss. 2011).

§ 97-19-55. Bad checks and insufficient funds.

(1) It shall be unlawful for any person with fraudulent intent:

(a) To make, draw, issue, utter or deliver any check, draft or order to obtain money, delivery of other valuable property, services, the use of property or credit extended by any licensed gaming establishment drawn on any real or fictitious bank, corporation, firm or person, knowing at the time of making, drawing, issuing, uttering or delivering said check, draft or order that the maker or drawer has not sufficient funds in or on deposit with such bank, corporation, firm or person for the payment of such check, draft or order in full, and all other checks, drafts or orders upon such funds then outstanding;

(b) To close an account without leaving sufficient funds to cover all outstanding checks written on such account.

(2) For purposes of Sections 97-19-55 through 97-19-69:

(a) "Check" includes a casino marker issued to any licensed gaming establishment.

(b) "Credit" means an arrangement or understanding with a bank, corporation, firm or person for the payment of a check or other instrument.

SOURCES: Codes, 1942, § 2153-01; Laws, 1972, ch. 476, § 1; Laws, 1983, ch. 523, § 1; Laws, 1998, ch. 477, § 1; Laws, 2002, ch. 311, § 1; Laws, 2009, ch. 454, § 2, eff from and after July 1, 2009.

Amendment Notes — The 2009 amendment rewrote (1); and added (2).

JUDICIAL DECISIONS

I. UNDER PRESENT LAW.

2. Sufficiency of evidence.

I. UNDER PRESENT LAW.

2. Sufficiency of evidence.

Evidence, including testimony from bank employee that defendant received regular monthly account statements, that

defendant's account was closed due to returned checks, and that a few days after the closure defendant would have received an account closure notification, was legally sufficient to convict defendant of false pretenses under Miss. Code Ann. § 97-19-55. *Lyles v. State*, 12 So. 3d 532 (Miss. Ct. App. 2009).

ATTORNEY GENERAL OPINIONS

It is unlawful for any person with fraudulent intent to make or issue a check, knowing at the time of the making of the check that the maker or drawer doesn't have sufficient funds in or on deposit with the bank for the payment of the check in full, and all other checks upon such funds

then outstanding. Whether or not specific actions of an individual constitute a crime is a factual determination that must be made by a court of competent jurisdiction. White, March 30, 2007, A.G. Op. #07-00165, 2007 Miss. AG LEXIS 67.

§ 97-19-71. Fraud in connection with state or federally funded assistance programs; penalty.

(1) Any person who knowingly:

(a) Fails, by false statement, misrepresentation, impersonation, or other fraudulent means, to disclose a material fact used in making a determination as to such person's qualification to receive aid or benefits or services under any state or federally funded assistance program; or

(b) Fails to disclose a change in circumstances in order to obtain or continue to receive under any such program aid or benefits or services to which he is not entitled or in an amount larger than that to which he is entitled, or who knowingly aids and abets another person in the commission of any such act is guilty of fraud.

(2) Any person who knowingly:

(a) Uses, transfers, acquires, traffics, alters, forges or possesses;

(b) Attempts to use, transfer, acquire, traffic, alter, forge or possess; or

(c) Aids and abets another person in the use, transfer, acquisition, trafficking, alteration, forgery or possession of a food stamp, a food stamp identification card, an electronic benefits transfer card or the benefits accessed by such card, an authorization for the purchase of food stamps, a certificate of eligibility for medical services, or a Medicaid identification card, for profit or in any manner not authorized by law or regulations issued by the agency responsible for the administration of the state or federally funded program is guilty of fraud.

(3) Any person who knowingly:

(a) Exchanges food purchased or obtained with; or

(b) Attempts to exchange food purchased or obtained with benefits or an electronic benefits transfer card under the federal Food and Nutrition Program for cash or anything of value other than food, is guilty of fraud.

(4) Any person having duties in the administration of a state or federally funded assistance program who fraudulently misappropriates, attempts to misappropriate, or aids and abets in the misappropriation of, a food stamp, an authorization for food stamps, a food stamp identification card, an electronic benefits transfer card, the benefits accessible by such card, a certificate of eligibility for prescribed medicine, a Medicaid identification card, or assistance from any other state or federally funded program with which he has been entrusted or of which he has gained possession by virtue of his position, or who knowingly fails to disclose any such fraudulent activity, is guilty of fraud.

(5) Any person who:

(a) Knowingly files, attempts to file, or aids and abets in the filing of, a claim for services to a recipient of benefits under any state or federally funded assistance program for services which were not rendered; knowingly files a false claim for nonauthorized items or services under such a program; or knowingly bills the recipient of benefits under such a program, or his family, for an amount in excess of that provided for by law or regulations; or

(b) In any way knowingly receives, attempts to receive, or aids and abets in the receipt of unauthorized payment as provided herein is guilty of fraud.

(6) Any person who knowingly signs, or aids and abets any person to sign, a false application for the replacement of benefits or aid to which that person is entitled claiming that person's benefits or aid was not received, is guilty of fraud.

(7) Any person convicted of the crime of fraud under this section shall be:

(a) Punished by imprisonment in the State Penitentiary for a term not exceeding three (3) years, and fined not less than One Thousand Dollars (\$1,000.00) nor more than Ten Thousand Dollars (\$10,000.00); or

(b) Punished by imprisonment in the county jail for a term not exceeding one (1) year, and fined not less than One Hundred Dollars (\$100.00) nor more than One Thousand Dollars (\$1,000.00); and

(c) Ordered to make full restitution of the money or services or the value of those services unlawfully received; and

(d) Where the legislation creating a program allows, suspended from participation in the program for the length of time allowed by the legislation creating the program.

(8) This section shall not prohibit prosecution under any other criminal statute of this state or the United States.

SOURCES: Laws, 1981, ch. 530, § 1; Laws, 2008, ch. 342, § 1, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment, in (2), substituted “trafficking” for “traffic” and inserted “an electronic benefits transfer card or the benefits accessed by such card”; added (3) and redesignated former (3) through (7) as present (4) through (8); and inserted “an electronic benefits transfer card, the benefits accessible by such card” in (4).

Cross References — Statute of limitation for prosecution for felonious assistance program fraud, see § 99-1-5.

§ 97-19-75. Bad check complaint procedures; restitution procedures.

(1) The holder of any check, draft or order for the payment of money which has been made, drawn, issued, uttered or delivered in violation of Section 97-19-55, Mississippi Code of 1972, may, after complying with the provisions of Section 97-19-57, Mississippi Code of 1972, present a complaint to the district attorney. The complaint shall be accompanied by the original check, draft or order upon which the complaint is filed and the return receipt showing mailing of notice under Section 97-19-57, Mississippi Code of 1972. Not more than one (1) check, draft or order shall be included within a single complaint. Upon receipt of such complaint, the district attorney shall evaluate the complaint to determine whether or not the complaint is appropriate to be processed by the district attorney.

(2) If, after filing a complaint with the district attorney, the complainant wishes to withdraw the complaint for good cause, the complainant shall pay a fee of Thirty Dollars (\$30.00) to the office of the district attorney for processing such complaint. Upon payment of the processing fee and withdrawal of the complaint, the district attorney shall return the original check, draft or order to the complainant.

(3) After approval of the complaint by the district attorney, a warrant may be issued by any judicial officer authorized by law to issue arrest warrants, and the warrant may be held by the district attorney. After issuance of a warrant or upon approval of a complaint by the district attorney, the district attorney shall issue a notice to the individual charged in the complaint, informing him that a warrant has been issued for his arrest or that a complaint has been received by the district attorney and that he may be eligible for deferred prosecution for a violation of Section 97-19-55, Mississippi Code of 1972, by voluntarily surrendering himself to the district attorney within ten (10) days, Saturdays, Sundays and legal holidays excepted, from receipt of the notice. Such notice shall be sent by United States mail.

(4)(a) If the check is not a casino marker, and the accused voluntarily surrenders himself within the time period as provided by subsection (3) of this section, the accused shall be presented with the complaint and/or warrant and prosecution of the accused may be deferred upon payment by the accused of a service charge in the amount of Forty Dollars (\$40.00) to the district attorney and by execution of a restitution agreement as hereinafter provided.

(b) If the check is a casino marker, and the accused voluntarily surrenders himself within the time period as provided by subsection (3) of this section, the accused shall be presented with the complaint and/or warrant, and prosecution of the accused may be deferred upon payment by the accused of a service charge in the amounts specified in this paragraph (b) to the district attorney and by execution of a restitution agreement as hereinafter provided. The amounts of the service charge are as follows:

(i) Forty Dollars (\$40.00), if the amount of the check or draft is equal to or less than One Hundred Dollars (\$100.00).

(ii) Fifty Dollars (\$50.00), if the face amount of the check or draft is more than One Hundred Dollars (\$100.00) but does not exceed Three Hundred Dollars (\$300.00).

(iii) Seventy-five Dollars (\$75.00), if the face amount of the check or draft is more than Three Hundred Dollars (\$300.00) but does not exceed One Thousand Dollars (\$1,000.00).

(iv) One Hundred Fifty Dollars (\$150.00), if the face amount of the check or draft is more than One Thousand Dollars (\$1,000.00) but does not exceed Two Thousand Five Hundred Dollars (\$2,500.00).

(v) Five Hundred Dollars (\$500.00), if the face amount of the check or draft is more than Two Thousand Five Hundred Dollars (\$2,500.00) but does not exceed Ten Thousand Dollars (\$10,000.00).

(vi) Ten percent (10%) of the face amount of the check or draft, if the face amount of the check or draft is more than Ten Thousand Dollars (\$10,000.00).

(5) For the purposes of Sections 97-19-73 through 97-19-81, the term “restitution” shall mean and be defined as the face amount of any check, draft or order for the payment of money made, drawn, issued, uttered or delivered in violation of Section 97-19-55, Mississippi Code of 1972, plus a service charge payable to the complainant in the amount of Thirty Dollars (\$30.00).

(6) After an accused has voluntarily surrendered himself and paid the service charge as provided by subsection (4) of this section, the district attorney may enter into a restitution agreement with the accused prescribing the terms by which the accused shall satisfy restitution to the district attorney on behalf of the complainant. The terms of such agreement shall be determined on a case-by-case basis by the district attorney, but the duration of any such agreement shall be no longer than a period of six (6) months. No interest shall be charged or collected on restitution monies. The restitution agreement shall be signed by the accused and approved by the district attorney before it is effective. If the accused does not honor each term of the restitution agreement signed by him, the accused may be proceeded against by prosecution under the provisions of Sections 97-19-55 through 97-19-69, Mississippi Code of 1972, and as provided by Section 97-19-79. If the accused makes restitution and pays all charges set out by statute or if the accused enters into a restitution agreement as set out above and honors all terms of such agreement, then if requested, the original check may be returned to the accused and a photocopy retained in the check file.

(7) If the holder of any check, draft or order for the payment of money presents to the district attorney satisfactory evidence that the original check, draft or order is unavailable and satisfactory evidence of the check, draft or order is presented in the form of bank records or a photographic copy of the instrument, whether from microfilm or otherwise, then the procedures provided for in this section may be followed in the absence of the original check, draft or order.

SOURCES: Laws, 1988, ch. 551, § 2; Laws, 1990, ch. 566, § 1; Laws, 1992, ch. 513, § 2; Laws, 1999, ch. 368, § 1; Laws, 2009, ch. 454, § 3, eff from and after July 1, 2009.

Amendment Notes — The 2009 amendment, in (4), inserted “the check is not a casino marker, and” near the beginning of (a), and added (b).

§ 97-19-85. Fraudulent use of identity, Social Security number, credit card or debit card number or other identifying information to obtain thing of value.

(1) Any person who shall make or cause to be made any false statement or representation as to his or another person’s or entity’s identity, social security account number, credit card number, debit card number or other identifying

information for the purpose of fraudulently obtaining or with the intent to obtain goods, services or any thing of value, shall be guilty of a felony and upon conviction thereof for a first offense shall be fined not more than Five Thousand Dollars (\$5,000.00) or imprisoned for a term not to exceed five (5) years, or both. For a second or subsequent offense such person, upon conviction, shall be fined not more than Ten Thousand Dollars (\$10,000.00) or imprisoned for a term not to exceed ten (10) years, or both. In addition to the fines and imprisonment provided in this section, a person convicted under this section shall be ordered to pay restitution as provided in Section 99-37-1 et seq.

(2) A person is guilty of fraud under subsection (1) who:

(a) Shall furnish false information willfully, knowingly and with intent to deceive anyone as to his true identity or the true identity of another person; or

(b) Willfully, knowingly, and with intent to deceive, uses a social security account number to establish and maintain business or other records; or

(c) With intent to deceive, falsely represents a number to be the social security account number assigned to him or another person, when in fact the number is not the social security account number assigned to him or such other person; or

(d) With intent to deceive, falsely represents to be a representative of an entity in order to open banking accounts, obtain credit cards, or other services and supplies in the entity's name; or

(e) Knowingly alters a social security card, buys or sells a social security card or counterfeit or altered social security card, counterfeits a social security card, or possesses a social security card or counterfeit social security card with intent to sell or alter it.

SOURCES: Laws, 1993, ch. 387, § 1; Laws, 1998, ch. 555, § 1; Laws, 2009, ch. 391, § 1, eff from and after July 1, 2009.

Amendment Notes — The 2009 amendment inserted “or entity’s” in the first sentence of (1); added (d); redesignated former (d) as present (e); and made a minor stylistic change.

CHAPTER 21

Forgery and Counterfeiting

Article 1.	General Provisions	97-21-1
Article 2.	Forfeiture of Property for Violations of Trademark and Recordings Laws	97-21-101

ARTICLE 1.

GENERAL PROVISIONS.

SEC.
97-21-53. Trade-marks; counterfeiting and forging of.

- 97-21-55. Trade-marks; possession of dies, plates, printed label or any imitation for purpose of vending imitation goods.
- 97-21-57. Trade-marks; sale of goods bearing counterfeit stamp or label.

§ 97-21-33. Penalty for forgery.

JUDICIAL DECISIONS

1. In general.
2. Guilty pleas.
3. Sentence.

1. In general.

Where appellant pleaded guilty to two counts of uttering a forgery in 2004, the trial court did not err by sentencing him to one year in prison and a \$1,000 fine for each count under the 2003 amendment to Miss. Code Ann. § 97-21-33. While the judge had the discretion to impose a lesser penalty as the amount forged was less than \$500, he was not required to do so. *Davis v. State*, 975 So. 2d 905 (Miss. Ct. App. 2008).

Defendant was entitled to be sentenced for uttering a forgery under the amended version of Miss. Code Ann. § 97-21-33 because it was amended before his conviction became final and his sentence was legal under Miss. Code Ann. § 99-19-33; the trial judge could sentence a person to a term of not less than two years nor more than ten years. *Peterson v. State*, 963 So. 2d 29 (Miss. Ct. App. 2007).

Postconviction relief was denied in a case where defendant entered a guilty plea to the charge of uttering a forgery because a felony sentence was properly imposed under a trial court's discretion where defendant had one indictment retired to the file, and she owed restitution on a charge in another county. *Tate v. State*, 961 So. 2d 763 (Miss. Ct. App. 2007).

Where a sentence of 10 years with five years suspended was entered in a case where defendant entered a guilty plea to the charge of uttering a forgery, defendant was unable to challenge the sentence in a motion for post-conviction relief since it was not raised at the time of sentence; at any rate, the issue of disproportionality was meritless because the sentence was within the limits of Miss. Code Ann. § 97-

21-33. *Tate v. State*, 961 So. 2d 763 (Miss. Ct. App. 2007).

Motion for post-conviction relief was properly dismissed based on an allegation of ineffective assistance of counsel because defendant was correctly informed of the 10-year maximum penalty for uttering forgery; however, the case was remanded for resentencing because plain error was committed when a trial court improperly imposed a 15-year sentence. *Jefferson v. State*, 958 So. 2d 1276 (Miss. Ct. App. 2007).

Defendant did not receive ineffective assistance of counsel by the failure to inform him of an amended sentence under Miss. Code Ann. § 97-21-33 because he was unable to show that he would have chosen to proceed to trial if he had been informed of such; defendant received a very favorable plea agreement under either sentencing scheme, and therefore it was unlikely that the outcome of the case would have been different. *Coleman v. State*, 971 So. 2d 637 (Miss. Ct. App. 2007), writ of certiorari denied by 2007 Miss. LEXIS 681 (Miss. Dec. 6, 2007), writ of certiorari denied by 2007 Miss. LEXIS 684 (Miss. Dec. 6, 2007), writ of certiorari denied by 973 So. 2d 244, 2007 Miss. LEXIS 686 (Miss. 2007).

In a hearing for post-conviction relief, a trial court did not err by changing a sentence imposed to reflect the amended sentencing range under Miss. Code Ann. § 97-21-33 where the facts showed that defendant entered a valid and voluntary guilty plea, but was sentenced illegally; it was an inadvertent failure of the trial court, the district attorney, and defense counsel to realize there was a change in the maximum sentence. *Coleman v. State*, 971 So. 2d 637 (Miss. Ct. App. 2007), writ of certiorari denied by 2007 Miss. LEXIS 681 (Miss. Dec. 6, 2007), writ of certiorari denied by 2007 Miss. LEXIS 684 (Miss.

Dec. 6, 2007), writ of certiorari denied by 973 So. 2d 244, 2007 Miss. LEXIS 686 (Miss. 2007).

Because defendant did not receive a suspended sentence, his sentence was not illegal under Miss. Code Ann. § 47-7-33(1) (Rev. 2004), and therefore his petition for post-conviction relief was properly dismissed as untimely, as it was not filed until March 2005; under Miss. Code Ann. § 99-39-5(2), defendant only had until June 5, 2003, to file his motion for post-conviction relief, and two years' incarceration plus one year of supervision did not exceed 15 years, the maximum sentence for uttering a forgery. *King v. State*, 929 So. 2d 373 (Miss. Ct. App. 2006).

2. Guilty pleas.

In a post-conviction appeal in which a state inmate had been sentenced to a term of 10 years in the custody of the Mississippi Department of Corrections with 10 years suspended and five years of probation for violating Miss. Code Ann. § 97-21-33, he argued unsuccessfully that his guilty plea should be set aside because he was incorrectly advised of the minimum sentence; he had been advised of the minimum and maximum sentence for the felony conviction and pled guilty to a felony charge. The minimum sentence for felony uttering a forgery was two years, not zero months, and the maximum sentence for the felony was 10 years; the inmate stated in open court that he knew the minimum and maximum sentence for the felony and

that he was guilty of the felony. *Bowen v. State*, 995 So. 2d 844 (Miss. Ct. App. 2008).

3. Sentence.

Circuit court appeared to largely rely on the fact that defendant engaged in a "malicious scheme" to defraud merchants by using a computer program to create counterfeit checks. In line with the proscribed sentencing factors, and the case law, the reviewing court could not find that the circuit court abused its discretion in considering the pending charges against defendant when it sentenced defendant within the statutory limits provided in Miss. Code Ann. § 97-21-33. *Davis v. State*, 17 So. 3d 1149 (Miss. Ct. App. 2009).

In a post-conviction appeal in which a state inmate had been sentenced to a term of 10 years in the custody of the Mississippi Department of Corrections with 10 years suspended and five years of probation for violating Miss. Code Ann. § 97-21-33, he argued unsuccessfully that his sentence was invalid since the amount involved in the crime was \$ 250 and the statute provided for misdemeanor penalties when the value involved was less than \$ 500. Section 97-21-33 clearly stated that the imposition of the sentence was within the trial judge's discretion, and, in the present case, the trial judge noted that the inmate had an extensive list of misdemeanors and an admitted addiction to cocaine. *Bowen v. State*, 995 So. 2d 844 (Miss. Ct. App. 2008).

§ 97-21-53. Trade-marks; counterfeiting and forging of.

(1) Every person who shall knowingly and willfully forge or counterfeit, or cause or procure to be forged or counterfeited, any representation, likeness, similitude, copy, or imitation of the private stamp, wrappers, or labels usually fixed by any mechanic or manufacturer to, and used by such mechanic or manufacturer on, in, or about the sale of any goods, wares, or merchandise whatsoever, shall be punished as follows:

(a) If the goods or services to which the forged or counterfeit representation, likeness, similitude, copy of imitation of the private stamp, wrappers or labels are attached or affixed, or in connection with which they are used, or to which the offender intended they be attached or affixed, or in connection with which the offender intended they be used, have, in the aggregate, a retail value of the goods if they were not forged or counterfeited of One Thousand Dollars (\$1,000.00), or more, the person shall be guilty of

a felony and, upon conviction, may be imprisoned for up to five (5) years and fined up to Ten Thousand Dollars (\$10,000.00); or

(b) If the goods or services to which the forged or counterfeit representation, likeness, similitude, copy, or imitation of the private stamp, wrappers, or labels are attached or affixed, or in connection with which they are used, or to which the offender intended they be attached or affixed, or in connection with which the offender intended they be used, have, in the aggregate, a retail value of less than One Thousand Dollars (\$1,000.00), the person shall be guilty of a misdemeanor and, upon conviction, may be imprisoned for up to one (1) year and fined up to Five Thousand Dollars (\$5,000.00).

(2) Property used in any way to violate the provisions of this section shall be subject to forfeiture under Sections 97-21-101 and 97-21-103.

SOURCES: Codes, 1857, ch. 64, art. 131; 1871, § 2595; 1880, § 2841; 1892, § 1306; 1906, § 1380; Hemingway's 1917, § 1123; 1930, § 1153; 1942, § 2390; Laws, 2009, ch. 378, § 1; Laws, 2011, ch. 346, § 3, eff from and after July 1, 2011.

Amendment Notes — The 2009 amendment substituted “shall be punished as follows” for “shall be guilty of a misdemeanor, and, upon conviction, shall be punished by fine not exceeding five hundred dollars, or imprisonment in the county jail not less than three months nor more than one year” at the end of the introductory paragraph; and added (a) and (b).

The 2011 amendment inserted the subsection (1) designation and added (2).

§ 97-21-55. Trade-marks; possession of dies, plates, printed label or any imitation for purpose of vending imitation goods.

(1) Every person who shall have in his possession any die, plate, engraving, or printed label, stamp, or wrapper, or any representation, likeness, similitude, copy, or imitation of the private stamp, wrapper, or label usually fixed by any mechanic or manufacturer to, and used by such mechanic or manufacturer on, in, or about the sale of any goods, wares, or merchandise, with intent to use or sell the said die, plate or engraving, or printed stamp, label, or wrapper, for the purpose of aiding or assisting, in any way whatever, in vending any goods, wares, or merchandise in imitation of, or intended to resemble and be sold for the goods, wares, or merchandise of such mechanic or manufacturer, shall be guilty of a felony, and, upon conviction, be punished by imprisonment for not more than five (5) years and a fine of Ten Thousand Dollars (\$10,000.00).

(2) Property used in any way to violate the provisions of this section shall be subject to forfeiture under Sections 97-21-101 and 97-21-103.

SOURCES: Codes, 1857, ch. 64, art. 132; 1871, § 2596; 1880, § 2842; 1892, § 1307; 1906, § 1381; Hemingway's 1917, § 1124; 1930, § 1154; 1942, § 2391; Laws, 2009, ch. 378, § 2; Laws, 2011, ch. 346, § 4, eff from and after July 1, 2011.

Amendment Notes — The 2009 amendment substituted “shall be guilty of a felony, and, upon conviction, be punished by imprisonment for not more than five (5) years and a fine of Ten Thousand Dollars (\$10,000.00)” for “shall be guilty of a misdemeanor, and, upon conviction, be punished by fine not exceeding five hundred dollars, or imprisonment in the county jail not less than three months nor more than one year” at the end of the section.

The 2011 amendment inserted the subsection (1) designation and added (2).

§ 97-21-57. Trade-marks; sale of goods bearing counterfeit stamp or label.

(1) Every person who shall sell, vend, or possess with intent to sell or vend any goods, wares, or merchandise having thereon any forged or counterfeit stamp or label, imitating, resembling, or purporting to be the stamp or label of any mechanic or manufacturer, knowing the same to be forged or counterfeited, and resembling or purporting to be imitations of the stamps or labels of such mechanic or manufacturer shall be punished as follows:

(a) If the goods or services to which the forged or counterfeit representation, likeness, similitude, copy, or imitation of the private stamp, wrappers, or labels are attached or affixed, or in connection with which they are used, or to which the offender intended they be attached or affixed, or in connection with which the offender intended they be used, have, in the aggregate, a retail value of the goods if they were not forged or counterfeited of One Thousand Dollars (\$1,000.00), or more, the person shall be guilty of a felony and, upon conviction, may be imprisoned for up to five (5) years and fined up to Ten Thousand Dollars (\$10,000.00); or

(b) If the goods or services to which the forged or counterfeit representation, likeness, similitude, copy, or imitation of the private stamp, wrappers, or labels are attached or affixed, or in connection with which they are used, or to which the offender intended they be attached or affixed, or in connection with which the offender intended they be used, have, in the aggregate, a retail value of the goods if they were not forged or counterfeited of less than One Thousand Dollars (\$1,000.00), the person shall be guilty of a misdemeanor and, upon conviction, may be imprisoned for up to one (1) year and fined up to Five Thousand Dollars (\$5,000.00).

(2) Property used in any way to violate the provisions of this section shall be subject to forfeiture under Sections 97-21-101 and 97-21-103.

SOURCES: Codes, 1857, ch. 64, art. 133; 1871, § 2597; 1880, § 2843; 1892, § 1308; 1906, § 1382; Hemingway’s 1917, § 1125; 1930, § 1155; 1942, § 2392; Laws, 2009, ch. 378, § 3; Laws, 2011, ch. 346, § 5; Laws, 2012, ch. 389, § 1, eff from and after July 1, 2012.

Amendment Notes — The 2009 amendment substituted “shall be punished as follows” for “shall be guilty of a misdemeanor, and, upon conviction, shall be punished by imprisonment in the county jail not exceeding three months, or by a fine not less than fifty nor more than five hundred dollars, or both” at the end of the introductory paragraph; and added (a) and (b).

The 2011 amendment inserted the subsection (1) designation; substituted “offender” for “offended” in (1)(b) and; added (2).

The 2012 amendment in (1), added “sell” preceding “vend”, and added “or possess with intent to sell or vend” thereafter near the beginning, and deleted “without disclosing the fact to the purchaser thereof” preceding “shall be punished as follows” near the end.

§ 97-21-59. Uttering counterfeit instrument or coin.

JUDICIAL DECISIONS

3. Evidence.
5. Sentencing considerations.

3. Evidence.

Defendant's convictions for uttering a forgery under Miss. Code Ann. § 97-21-1 and for conspiracy under Miss. Code Ann. § 97-1-1 were affirmed because there was sufficient evidence for the jury to find that defendant possessed the forged checks and attempted to pass these checks off as true and although the co-conspirator was an admitted drug addict, his testimony was not self-contradictory or thoroughly impeached. *Nelson v. State*, 32 So. 3d 534 (Miss. Ct. App. 2009), writ of certiorari denied by 31 So. 3d 1217, 2010 Miss. LEXIS 186 (Miss. 2010).

Defendant's convictions for uttering a forgery under Miss. Code Ann. § 97-21-1 and for conspiracy under Miss. Code Ann. § 97-1-1 were affirmed because there was sufficient evidence for the jury to find that defendant possessed the forged checks and attempted to pass these checks off as true and although the co-conspirator was an admitted drug addict, his testimony was not self-contradictory or thoroughly impeached. *Nelson v. State*, 32 So. 3d 534 (Miss. Ct. App. 2009), writ of certiorari denied by 31 So. 3d 1217, 2010 Miss. LEXIS 186 (Miss. 2010).

Motion for post-conviction relief was denied in a case where defendant pled guilty to uttering a forgery because a claim that the charge should have been for false pretenses instead was procedurally

barred under Miss. Code Ann. § 99-39-21(1) since the issue was not raised in the plea; despite the bar, the issue was meritless because defendant admitted in the plea colloquy that she knowingly created a fictitious name for use on a bank account and presented a check drawn on that account for payment at a retail store. *Tate v. State*, 961 So. 2d 763 (Miss. Ct. App. 2007).

5. Sentencing considerations.

Motion for post-conviction relief was properly dismissed based on an allegation of ineffective assistance of counsel because defendant was correctly informed of the 10-year maximum penalty for uttering forgery; however, the case was remanded for resentencing because plain error was committed when a trial court improperly imposed a 15-year sentence. *Jefferson v. State*, 958 So. 2d 1276 (Miss. Ct. App. 2007).

Because defendant did not receive a suspended sentence, his sentence was not illegal under Miss. Code Ann. § 47-7-33(1) (Rev. 2004), and therefore his petition for post-conviction relief was properly dismissed as untimely, as it was not filed until March 2005; under Miss. Code Ann. § 99-39-5(2), defendant only had until June 5, 2003, to file his motion for post-conviction relief, and two years' incarceration plus one year of supervision did not exceed 15 years, the maximum sentence for uttering a forgery. *King v. State*, 929 So. 2d 373 (Miss. Ct. App. 2006).

ARTICLE 2.

FORFEITURE OF PROPERTY FOR VIOLATIONS OF TRADEMARK AND RECORDINGS LAWS.

SEC.

- 97-21-101. Property used in trademark and recordings violations subject to civil forfeiture; who may institute proceedings.
- 97-21-103. Seizure and forfeiture proceedings; determination of property owner;

determination of existence of parties with security interests affecting property; notice to holders of security interests; hearing; disposition of forfeited property and proceeds.

§ 97-21-101. Property used in trademark and recordings violations subject to civil forfeiture; who may institute proceedings.

(1) All property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of Section 97-21-53, 97-21-55, 97-21-57 or 97-23-89 is subject to civil forfeiture to the state pursuant to the provisions of Section 97-21-103; provided, however, that a forfeiture of personal property encumbered by a bona fide security interest or real property encumbered by a bona fide mortgage, deed of trust, lien or encumbrance of record shall be subject to the interest of the secured party or subject to the interest of the holder of the mortgage, deed of trust, lien or encumbrance of record if such secured party or holder neither had knowledge of or consented to the act or omission.

(2) Property subject to forfeiture may be seized by law enforcement officers upon process issued by any appropriate court having jurisdiction over the property. Seizure without process may be made if:

(a) The seizure is incident to an arrest or a search under a search warrant or an inspection under a lawful administrative inspection;

(b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this article.

(3) The Attorney General, any district attorney or any state agency having jurisdiction over conduct in violation of Section 97-21-53, 97-21-55, 97-21-57 or 97-23-89 may institute civil proceedings under this section. In any action brought under this section, the circuit court shall proceed as soon as practicable to the hearing and determination. Pending final determination, the circuit court may at any time enter such injunctions or restraining orders, or take such actions, including the acceptance of satisfactory performance bonds, as the court may deem proper.

(4) Any aggrieved person may institute a civil proceeding against any person or enterprise convicted of engaging in activity in violation of Section 97-21-53, 97-21-55, 97-21-57 or 97-23-89. In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that no showing of immediate and irreparable injury, loss or damage to the person shall have to be made.

(5) The Attorney General may, upon timely application, intervene in any civil action or proceeding brought under this section if he certifies that, in his opinion, the action or proceeding is of general public importance. In such action or proceeding, the state shall be entitled to the same relief as if the Attorney General instituted the action or proceeding.

(6) Notwithstanding any other provision of law, a criminal or civil action or proceeding under this article may be commenced at any time within five (5) years after the conduct in violation of law terminates or the cause of action accrues. If a criminal prosecution or civil action or other proceeding is brought, or intervened in, to punish, prevent or restrain any violation of law, the running of the period of limitations prescribed by this section with respect to any cause of action arising under this section which is based, in whole or in part, upon any matter complained of in any such prosecution, action or proceeding shall be suspended during the pendency of such prosecution, action or proceeding and for two (2) years following its termination.

(7) The application of one (1) civil remedy under any provision of this article shall not preclude the application of any other remedy, civil or criminal, under this article or any other provision of law. Civil remedies under this article are supplemental.

SOURCES: Laws, 2011, ch. 346, § 1, eff from and after July 1, 2011.

§ 97-21-103. Seizure and forfeiture proceedings; determination of property owner; determination of existence of parties with security interests affecting property; notice to holders of security interests; hearing; disposition of forfeited property and proceeds.

(1) When any property is seized pursuant to Section 97-21-101, proceedings under this section shall be instituted promptly.

(2)(a) A petition for forfeiture shall be filed promptly in the name of the State of Mississippi with the clerk of the circuit court of the county in which the seizure is made. A copy of such petition shall be served upon the following persons by service of process in the same manner as in civil cases:

(i) The owner of the property, if address is known;

(ii) Any secured party who has registered his lien or filed a financing statement as provided by law, if the identity of such secured party can be ascertained by the state by making a good faith effort to ascertain the identity of such secured party as described in paragraphs (b), (c), (d), (e) and (f) of this subsection;

(iii) Any other bona fide lienholder or secured party or other person holding an interest in the property in the nature of a security interest of whom the state has actual knowledge;

(iv) A holder of a mortgage, deed of trust, lien or encumbrance of record, if the property is real estate by making a good faith inquiry as described in paragraph (g) of this section; and

(v) Any person in possession of property subject to forfeiture at the time that it was seized.

(b) If the property is a motor vehicle susceptible of titling under the Mississippi Motor Vehicle Title Law and if there is any reasonable cause to believe that the vehicle has been titled, the state shall make inquiry of the Department of Revenue as to what the records of the Department of Revenue

show as to who is the record owner of the vehicle and who, if anyone, holds any lien or security interest which affects the vehicle.

(c) If the property is a motor vehicle and is not titled in the State of Mississippi, then the state shall attempt to ascertain the name and address of the person in whose name the vehicle is licensed, and if the vehicle is licensed in a state which has in effect a certificate of title law, the state shall make inquiry of the appropriate agency of that state as to what the records of the agency show as to who is the record owner of the vehicle and who, if anyone, holds any lien, security interest, or other instrument in the nature of a security device which affects the vehicle.

(d) If the property is of a nature that a financing statement is required by the laws of this state to be filed to perfect a security interest affecting the property and if there is any reasonable cause to believe that a financing statement covering the security interest has been filed under the laws of this state, the state shall make inquiry of the appropriate office designated in Section 75-9-501 as to what the records show as to who is the record owner of the property and who, if anyone, has filed a financing statement affecting the property.

(e) If the property is an aircraft or part thereof and if there is any reasonable cause to believe that an instrument in the nature of a security device affects the property, then the state shall make inquiry of the administrator of the Federal Aviation Administration as to what the records of the administrator show as to who is the record owner of the property and who, if anyone, holds an instrument in the nature of a security device which affects the property.

(f) In the case of all other personal property subject to forfeiture, if there is any reasonable cause to believe that an instrument in the nature of a security device affects the property, then the state shall make a good faith inquiry to identify the holder of any such instrument.

(g) If the property is real estate, the state shall make inquiry at the appropriate places to determine who is the owner of record and who, if anyone is a holder of a bona fide mortgage, deed of trust, lien or encumbrance.

(h) In the event the answer to an inquiry states that the record owner of the property is any person other than the person who was in possession of it when it was seized, or states that any person holds any lien, encumbrance, security interest, other interest in the nature of a security interest, mortgage or deed of trust which affects the property, the state shall cause any record owner and also any lienholder, secured party, other person who holds an interest in the property in the nature of a security interest, or holder of an encumbrance, mortgage or deed of trust which affects the property to be named in the petition of forfeiture and to be served with process in the same manner as in civil cases.

(i) If the owner of the property cannot be found and served with a copy of the petition of forfeiture, or if no person was in possession of the property subject to forfeiture at the time that it was seized and the owner of the

property is unknown, the state shall file with the clerk of the court in which the proceeding is pending an affidavit to such effect, whereupon the clerk of the court shall publish notice of the hearing addressed to “the Unknown Owner of _____,” filling in the blank space with a reasonably detailed description of the property subject to forfeiture. Service by publication shall contain the other requisites prescribed in Section 11-33-41, and shall be served as provided in Section 11-33-37 for publication of notice for attachments at law.

(j) No proceedings instituted pursuant to the provisions of this article shall proceed to hearing unless the judge conducting the hearing is satisfied that this section has been complied with. Any answer received from an inquiry required by paragraphs (b) through (g) of this section shall be introduced into evidence at the hearing.

(3)(a) An owner of property that has been seized shall file a verified answer within twenty (20) days after the completion of service of process. If no answer is filed, the court shall hear evidence that the property is subject to forfeiture and forfeit the property to the state. If an answer is filed, a time for hearing on forfeiture shall be set within thirty (30) days of filing the answer or at the succeeding term of court if court would not be in progress within thirty (30) days after filing the answer. Provided, however, that upon request by the state or the owner of the property, the court may postpone said forfeiture hearing to a date past the time any criminal action is pending against said owner.

(b) If the owner of the property has filed a verified answer denying that the property is subject to forfeiture, then the burden is on the state or the jurisdiction instituting proceedings to prove that the property is subject to forfeiture. The burden of proof placed upon the state or the jurisdiction instituting proceedings shall be clear and convincing proof. However, if no answer has been filed by the owner of the property, the petition for forfeiture may be introduced into evidence and is prima facie evidence that the property is subject to forfeiture.

(c) At the hearing any claimant of any right, title, or interest in the property may prove his lien, encumbrance, security interest, other interest in the nature of a security interest, mortgage or deed of trust to be bona fide and created without knowledge or consent that the property was to be used so as to cause the property to be subject to forfeiture.

(d) If it is found that the property is subject to forfeiture, then the judge shall forfeit the property to the state or the jurisdiction instituting proceedings. However, if proof at the hearing discloses that the interest of any bona fide lienholder, secured party, other person holding an interest in the property in the nature of a security interest or any holder of a bona fide encumbrance, mortgage or deed of trust is greater than or equal to the present value of the property, the court shall order the property released to him. If such interest is less than the present value of the property and if the proof shows that the property is subject to forfeiture, the court shall order the property forfeited to the state or the jurisdiction instituting proceedings.

(4)(a) All personal property, including money, which is forfeited to the state or the jurisdiction instituting proceedings and is not capable of being sold at public auction shall be liquidated and the proceeds, after deduction of all storage and court costs, shall be forwarded to the State Treasurer and deposited in the General Fund of the state or in the general fund of the county of the jurisdiction instituting proceedings.

(b) All real estate which is forfeited to the state or the jurisdiction instituting proceedings shall be sold to the highest bidder at a public auction to be conducted by the state or the jurisdiction instituting proceedings at such place, on such notice and in accordance with the same procedure, as far as practicable, as is required in the case of sales of land under execution of law. The proceeds of such sale shall first be applied to the cost and expense in administering and conducting such sale, then to the satisfaction of all mortgages, deeds of trusts, liens and encumbrances of record on such property. All proceeds in excess of the amount necessary for the cost of the sale of such land and the satisfaction of any liens thereon shall be deposited in the General Fund of the State Treasury or in the general fund of the county of the jurisdiction instituting proceedings.

(c) All other property that has been seized by the state or the jurisdiction instituting proceedings and that has been forfeited shall, except as otherwise provided, be sold at a public auction for cash by the state or the jurisdiction instituting proceedings to the highest and best bidder after advertising the sale for at least once each week for three (3) consecutive weeks, the last notice to appear not more than ten (10) days nor less than five (5) days prior to such sale, in a newspaper having a general circulation in the jurisdiction instituting proceedings or throughout the State of Mississippi. Such notices shall contain a description of the property to be sold and a statement of the time and place of sale. It shall not be necessary to the validity of such sale either to have the property present at the place of sale or to have the name of the owner thereof stated in such notice. The proceeds of the sale shall be delivered to the circuit clerk and shall be disposed of as follows:

(i) To any bona fide lienholder, secured party, or other party holding an interest in the property in the nature of a security interest, to the extent of his interest; and

(ii) The balance, if any, after deduction of all storage and court costs, shall be forwarded to the State Treasurer and deposited with and used as general funds of the state or to the jurisdiction instituting proceedings and deposited in the county general fund.

(d) The Department of Revenue shall issue a certificate of title to any person who purchases property under the provisions of this section when a certificate of title is required under the laws of this state.

SOURCES: Laws, 2011, ch. 346, § 2, eff from and after July 1, 2011.

CHAPTER 23

Offenses Affecting Trade, Business and Professions

SEC.

- 97-23-19. Embezzlement; by agents, bailees, trustees, servants and persons generally.
- 97-23-87. Unauthorized copying or sale of recordings.
- 97-23-89. Sale, distribution of recordings without display of required information.
- 97-23-107. Residential mortgage fraud; elements of offense; establishing venue; penalties; forfeiture of all property used in or obtained through violation of section; pattern of residential mortgage fraud.

§ 97-23-3. Advertising; untrue, deceptive, or misleading.

JUDICIAL DECISIONS

1. In general.

Because plaintiff former smoker identified no representations about defendant tobacco producers' cigarettes, much less any that were untrue, deceptive, or misleading, and conceded the advertising was not or misleading and that it did not cause

her to start or continue smoking, a false advertising claim under Miss. Code Ann. § 97-23-3 failed. *Woods v. R.J. Reynolds Tobacco Co.*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 51565 (S.D. Miss. June 18, 2009).

§ 97-23-19. Embezzlement; by agents, bailees, trustees, servants and persons generally.

If any person shall embezzle or fraudulently secrete, conceal, or convert to his own use, or make way with, or secrete with intent to embezzle or convert to his own use, any goods, rights in action, money, or other valuable security, effects, or property of any kind or description which shall have come or been entrusted to his care or possession by virtue of his office, position, place, or employment, either in mass or otherwise, with a value of Five Hundred Dollars (\$500.00) or more, he shall be guilty of felony embezzlement, and, upon conviction thereof, shall be imprisoned in the custody of the Department of Corrections not more than ten (10) years, or fined not more than Twenty-five Thousand Dollars (\$25,000.00), or both. If the value of such goods, rights in action, money or other valuable security, effects, or property of any kind is less than Five Hundred Dollars (\$500.00), he shall be guilty of misdemeanor embezzlement, and, upon conviction thereof, shall be imprisoned in the county jail not more than six (6) months, or fined not more than One Thousand Dollars (\$1,000.00), or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(59); 1857, ch. 64, art. 82; 1871, § 2547; 1880, § 2782; 1892, § 1058; 1906, § 1136; Hemingway's 1917, § 864; 1930, § 889; 1942, § 2115; Laws, 2003, ch. 499, § 7; Laws, 2007, ch. 378, § 1, eff from and after passage (approved Mar. 15, 2007.)

Amendment Notes — The 2007 amendment, in the first sentence, substituted "person" for "director, agent, clerk, servant, or officer of any incorporated company, or if

any trustee or factor, carrier or bailee, or any clerk, agent or servant of any private" following "If any," substituted "entrusted" for "intrusted," inserted "position" following "his office," substituted "custody of the Department of Corrections" for "Penitentiary," and substituted "Twenty-five Thousand Dollars (\$25,000.00)" for "Ten Thousand Dollars (\$10,000.00)."

JUDICIAL DECISIONS

1. In general.
2. Indictment.
5. Proof.
7. Sentencing.
8. Motion for directed verdict.

1. In general.

There is no lesser-included offense of embezzlement. *Lockett v. State*, 989 So. 2d 995 (Miss. Ct. App. 2008).

The legislature's narrow and precise language in the embezzlement statute does not include limited liability companies because Miss. Code Ann. § 97-23-19 plainly does not allow agents of unincorporated entities to be subjected to prosecution for embezzlement. *Champluvier v. State*, 942 So. 2d 145 (Miss. 2006).

2. Indictment.

Indictment charging defendant with embezzlement sufficiently provided notice of the essential elements of the crime of embezzlement, and the indictment cited to the statute proscribing embezzlement; accordingly, the indictment was proper. *Wilson v. State*, 12 So. 3d 8 (Miss. Ct. App. 2008), writ of certiorari denied by 14 So. 3d 731, 2009 Miss. LEXIS 306 (Miss. 2009).

5. Proof.

Evidence was sufficient to support defendant's embezzlement conviction under Miss. Code Ann. § 97-23-19 as it was reasonable for a jury to infer defendant converted funds to defendant's own use when the evidence showed defendant failed to account for and to pay over money defendant was responsible for depositing in the bank as a manager of three stores. *Cummings v. State*, 58 So. 3d 715 (Miss. Ct. App. 2011).

In a case in which defendant appealed her conviction for violating Miss. Code Ann. § 97-23-19, she unsuccessfully argued that the verdict was not supported by the overwhelming weight of the evi-

dence because too much weight was placed on the 86-year old victim's testimony and that the victim's testimony was riddled with inconsistencies and contradictions. The claim was an exaggeration not supported by the record. *Barnes v. State*, 30 So. 3d 313 (Miss. 2010).

Verdict finding defendant guilty of embezzlement was not contrary to the overwhelming weight of the evidence. Although the victim, who testified that she hired defendant to procure a truck for her from an automobile auction, repeatedly called defendant and attempted to meet defendant to pick up the truck, defendant never fulfilled his end of the agreement by procuring a truck for the victim, nor did defendant repay the victim any of the money entrusted to him as a down payment. *Wilson v. State*, 12 So. 3d 8 (Miss. Ct. App. 2008), writ of certiorari denied by 14 So. 3d 731, 2009 Miss. LEXIS 306 (Miss. 2009).

Lower court properly reversed a church deacon's embezzlement conviction under Miss. Code Ann. § 97-23-19 as the statute required that the victim be either an incorporated company or a private person and the church was operating as an unincorporated religious society under Miss. Code Ann. § 79-11-31. *Coleman v. State*, 947 So. 2d 878 (Miss. 2006).

Evidence was insufficient to sustain defendant's conviction for embezzlement from a limited liability company because Miss. Code Ann. § 97-23-19 did not apply to limited liability companies; it only applied to "incorporated companies" and "private persons." *Champluvier v. State*, 942 So. 2d 145 (Miss. 2006).

7. Sentencing.

In an embezzlement case, a trial court erred in sentencing defendants because defendants' conduct could clearly fall under Miss. Code Ann. § 97-23-25 or Miss. Code Ann. § 97-23-19; the conduct was

required to be treated as leniently as possible because a lesser punishment applied. *Salts v. State*, — So. 2d —, 2007 Miss. App. LEXIS 513 (Miss. Ct. App. Aug. 7, 2007), opinion withdrawn by, substituted opinion at, remanded by 984 So. 2d 1050, 2008 Miss. App. LEXIS 199 (Miss. Ct. App. 2008).

8. Motion for directed verdict.

State failed to prove the elements of embezzlement in violation of Miss. Code Ann. § 97-23-19 beyond a reasonable doubt and thus the trial court erred in denying defendant's motion for a directed verdict; in order to prove embezzlement, the State had to provide evidence of the following: (1) a company owned the car in question, (2) the car was lawfully entrusted to defendant, and (3) defendant

wrongfully converted the vehicle to his own use, and while the State established car ownership by the company given the vehicle identification number, the State did not prove that defendant was entrusted with the vehicle, given that (1) defendant did not have permission to take company vehicle off the lot just by being an employee of the company, (2) the car belonged to a different location where defendant was never employed, and (3) defendant did not possess a valid driver's license, which prohibited him from lawfully driving company vehicles as part of his job. At best, the evidence might have shown the actual theft of property, but it did not prove embezzlement, and the court reversed and rendered. *Lockett v. State*, 989 So. 2d 995 (Miss. Ct. App. 2008).

§ 97-23-25. Embezzlement; property held in trust or received on contract.

JUDICIAL DECISIONS

1. In general.
5. Sentencing.
6. Jury instructions.

1. In general.

Defendant failed to notify a business that rented defendant of goods of two changes of address, in violation of the rental agreement; a jury could infer that defendant formed the requisite intent to embezzle by contract after defendant's girlfriend destroyed the goods, and defendant moved, leaving no forwarding address despite the girlfriend's indication that she wanted to pay for the goods. *Crump v. State*, 962 So. 2d 154 (Miss. Ct. App. 2007).

5. Sentencing.

In an embezzlement case, a trial court erred in sentencing defendants because defendants' conduct could clearly fall under Miss. Code Ann. § 97-23-25 or Miss. Code Ann. § 97-23-19; the conduct was required to be treated as leniently as

possible because a lesser punishment applied. *Salts v. State*, — So. 2d —, 2007 Miss. App. LEXIS 513 (Miss. Ct. App. Aug. 7, 2007), opinion withdrawn by, substituted opinion at, remanded by 984 So. 2d 1050, 2008 Miss. App. LEXIS 199 (Miss. Ct. App. 2008).

6. Jury instructions.

Court properly refused to instruct the jury that specific intent to defraud was required to prove embezzlement because the jury instruction stated that defendants were charged with embezzlement, and the jury should find defendants guilty if it found beyond a reasonable doubt that they had "fraudulently appropriated" various sums of money. Even without a separate definition, that language necessarily implied that defendants had intentionally defrauded the victims. *Salts v. State*, 984 So. 2d 1050 (Miss. Ct. App. 2008), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 334 (Miss. 2008).

§ 97-23-87. Unauthorized copying or sale of recordings.

(1) For purposes of this section, the following words shall have the meaning ascribed herein, unless the context requires otherwise:

(a) "Person" means any individual, partnership, corporation, association or any communications media, including radio or television, broadcasters or licensees, newspapers, magazines, or other publications or media which offer facilities for the purposes stated herein.

(b) "Owner" means the person who owns, or who has the license in the United States to produce or to distribute to the public copies of the original fixation of sounds or pictures embodied in, the master phonograph record, master disc, master tape, master videocassette, master film or other device used for reproducing recorded sounds or images on phonograph records, discs, tapes, films or other articles on which sound or images are recorded, and from which the transferred recorded sounds or images are directly or indirectly derived.

(2)(a) Any person who shall knowingly and willfully transfer or cause to be transferred, without the consent of the owner, any sounds or images recorded on phonograph record, disc, wire, tape, videocassette, film, or other article or device on which sounds or images are recorded with intent to sell, rent for a fee, or cause to be sold, or rented for a fee or for any financial gain the article on which such sounds or images are transferred, shall be guilty of a felony and, upon conviction of a first violation of this subsection, shall be fined not more than Twenty-five Thousand Dollars (\$25,000.00) or be imprisoned in the State Penitentiary for not more than five (5) years, or both. Any person who shall be convicted of a second or subsequent violation of this subsection shall be fined not more than One Hundred Thousand Dollars (\$100,000.00) or be imprisoned not more than ten (10) years, or both.

(b) Any person who records, masters or causes to be recorded or mastered on any recorded article or device with the intent to sell, market or lease for commercial advantage or private financial gain, the sounds or images of a live performance, with the knowledge that the sounds or images so recorded have been recorded or mastered without the consent of the owner of the sounds of the live performance, is guilty of a felony, and upon conviction thereof, shall be subject to fine and imprisonment as provided for the first and subsequent convictions of violations of subsection (2)(a). In the absence of a written agreement or operation of law to the contrary, the performer or performers of the sounds of a live performance shall be presumed to own the right to record or master those sounds. Such performers shall also be deemed, in absence of such agreement or operation of law, to own the right to display and distribute their own personal images.

(c) Each and every individual and separate manufacture of a recorded device as described in this subsection shall constitute a separate offense of this subsection.

(3)(a) It is unlawful for any person to:

(i) Advertise, offer for sale or sell any such article or device described in subsection (2)(a) of this section with the knowledge that the sounds or images thereon have been transferred without the consent of the owner;

(ii) Offer or make available for a fee, rental or any other form of compensation, directly or indirectly, any equipment or machinery with the knowledge that it will be used by another to reproduce, without the consent of the owner, any phonograph record, disc, wire, tape, videocassette, film or other article on which sounds or images have been transferred; or

(iii) Possess with intent to sell, to make available for a fee, rental or other form of compensation, or for the purpose of obtaining any form of compensation through the use of any article or device described in subsection (2) (a), with the knowledge that the sounds or images thereon have been transferred without the consent of the owner.

Any person convicted of a first violation of this subsection shall be guilty of a felony and fined not more than Five Thousand Dollars (\$5,000.00) or imprisoned in the State Penitentiary for not more than three (3) years, or both. Any person convicted of a second or subsequent violation of this subsection shall be guilty of a felony and fined not more than Fifty Thousand Dollars (\$50,000.00) or imprisoned in the State Penitentiary for not more than seven (7) years, or both.

(b) Each and every individual advertisement, offer for sale, sale, rental or possession of such recorded devices or offer or making available of equipment or machinery in violation of the provisions of this subsection shall constitute a separate offense.

(4) The provisions of this subsection shall not apply to reproduction of sounds or images made in the home for private use with no purpose of otherwise capitalizing commercially on such reproduction.

SOURCES: Laws, 1974, ch. 527, § 1; Laws, 1992, ch. 556, § 1; Laws, 2009, ch. 378, § 4, eff from and after July 1, 2009.

Amendment Notes — The 2009 amendment deleted the former last sentence of (2)(a), which read: “The provisions of this paragraph (2)(a) apply only to sound and image recordings that were fixed initially before February 15, 1972.”

JUDICIAL DECISIONS

1. Illegal conduct.

Trial court erred in overturning the denial of unemployment benefits to a corrections employee who was terminated where the employee admitted to distributing bootleg copies of DVDs to coworkers while at work, in violation of Miss. Code

Ann. § 47-5-49; employee also admitted knowing that distributing bootleg copies of DVDs was illegal under Miss. Code Ann. § 97-23-87(3)(a)(I) and Miss. Code Ann. § 97-23-89(2). Miss. Dep’t of Corr. v. Scott, 929 So. 2d 975 (Miss. Ct. App. 2006).

§ 97-23-89. Sale, distribution of recordings without display of required information.

(1) For purposes of this section, the following words shall have the meaning ascribed herein, unless the context requires otherwise:

(a) "Person" means any individual, partnership, corporation or association.

(b) "Manufacturer" means any individual, partnership, corporation or association which, after first having acquired the right to transfer sounds or images from the lawful owner thereof, actually transfers or causes the transfer thereon of such sounds or images recorded on a phonograph record, disc, wire, tape, videocassette, film or other article on which sounds or images are recorded, or assembles and transfers any product containing such transferred sounds or images as a component thereof.

(2) It shall be unlawful for any person to manufacture or knowingly (a) sell, rent, distribute or circulate, (b) cause to be sold, distributed or circulated, or (c) possess with intent to sell, rent, distribute or circulate, for any compensation, a recorded article or device containing sounds or images, including any phonograph record, tape, disc, videocassette, film or other article or device upon which sounds or images may be fixed or reproduced, without the actual name and street address of the manufacturer thereof and, when the recorded article or device contains sounds only, without the name of the actual performer or group of performers prominently disclosed on the cover, jacket, box or label containing such recorded article or device. Any person who is convicted of a first violation of this subsection shall be guilty of a felony and fined not more than Ten Thousand Dollars (\$10,000.00) or be imprisoned in the State Penitentiary for not more than three (3) years, or both. Any person who is convicted of a second or subsequent violation of this subsection shall be guilty of a felony and fined not more than Fifty Thousand Dollars (\$50,000.00) or be imprisoned in the State Penitentiary for not more than seven (7) years, or both.

(3) Each and every individual manufacture, distribution or sale or transfer for a consideration of such recorded article or device in violation of the provisions of this section shall constitute a separate offense.

(4) Property used in any way to violate the provisions of this section shall be subject to forfeiture under Sections 97-21-101 and 97-21-103.

SOURCES: Laws, 1974, ch. 527, § 2; Laws, 1992, ch. 556, § 2; Laws, 2011, ch. 346, § 6, eff from and after July 1, 2011.

Amendment Notes — The 2011 amendment added (4).

JUDICIAL DECISIONS

1. Illegal conduct.

Trial court erred in overturning the denial of unemployment benefits to a corrections employee who was terminated

where the employee admitted to distributing bootleg copies of DVDs to coworkers while at work, in violation of Miss. Code Ann. § 47-5-49; employee also admitted

knowing that distributing bootleg copies of DVDs was illegal under Miss. Code Ann. § 97-23-87(3)(a)(I) and Miss. Code

Ann. § 97-23-89(2). Miss. Dep't of Corr. v. Scott, 929 So. 2d 975 (Miss. Ct. App. 2006).

§ 97-23-93. Shoplifting; elements of offense; presumptions; evidence; penalties; aggregation of multiple offenses occurring within same jurisdiction over 30-day period in determining gravity of offense.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1. In general.
2. Subsequent offenses.
4. Evidence.
5. Indictments.
6. Sentence.

I. UNDER CURRENT LAW.

1. In general.

Defendant was properly convicted as a felony shoplifter based upon Miss. Code Ann. § 97-23-93 as it existed on November 4, 2002. *Wilson v. State*, 967 So. 2d 32 (Miss. 2007).

2. Subsequent offenses.

State inmate convicted of third-offense felony shoplifting under Miss. Code Ann. § 97-23-93(6) and sentenced to life in prison without the possibility of parole was granted habeas corpus under 28 U.S.C.S. § 2254 based on a fundamental miscarriage of justice because the facts presented at sentencing did not establish that the inmate had actually served one year in prison for a prior felony conviction, an essential element to prove habitual offender status under Miss. Code Ann. § 99-19-83. *Sumrell v. Mississippi*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 30798 (N.D. Miss. Apr. 9, 2009), opinion withdrawn by 2009 U.S. Dist. LEXIS 39162 (N.D. Miss. May 8, 2009).

4. Evidence.

Inmate waived any argument as to any possible evidentiary defects in his indictment charging him as a habitual offender for felony shoplifting pursuant to Miss. Code Ann. § 97-23-93(7) because by entering his guilty plea, the inmate fully admitted to the circuit court that he was guilty

of shoplifting merchandise with a value greater than \$ 500, and that testimony was sufficient to constitute felony shoplifting under § 97-23-93(7), *Phillips v. State*, 25 So. 3d 404 (Miss. Ct. App. 2010).

5. Indictments.

Inmate waived any argument as to any possible evidentiary defects in his indictment charging him as a habitual offender for felony shoplifting pursuant to Miss. Code Ann. § 97-23-93(7) because by entering his guilty plea, the inmate fully admitted to the circuit court that he was guilty of shoplifting merchandise with a value greater than \$ 500, and that testimony was sufficient to constitute felony shoplifting under § 97-23-93(7), *Phillips v. State*, 25 So. 3d 404 (Miss. Ct. App. 2010).

6. Sentence.

In a case in which defendant had been sentenced to 10 years of imprisonment as a habitual offender after violating Miss. Code Ann. § 97-23-93, defendant unsuccessfully argued that she should not have been charged as a habitual offender as the sentences for her two previous convictions were served concurrently. The two prior felonies were separate incidents, which occurred at different times, and each carried a sentence of at least one year; the fact that she was only incarcerated for one year while serving her concurrent sentences did not afford her relief from habitual offender status under Miss. Code Ann. § 99-19-81. *Williams v. State*, 24 So. 3d 360 (Miss. Ct. App. 2009).

In a case in which defendant had been sentenced to 10 years of imprisonment as a habitual offender after violating Miss. Code Ann. § 97-23-93, defendant unsuccessfully argued that her sentence was

unconstitutional as it exceeded the maximum sentence allowed by law. As she was a habitual offender, the circuit court was required under Miss. Code Ann. § 99-19-81 to impose the maximum sentence

for grand larceny, which, under Miss. Code Ann. § 97-17-41, was 10 years and a fine of \$ 10,000. *Williams v. State*, 24 So. 3d 360 (Miss. Ct. App. 2009).

§ 97-23-101. Laundering of monetary instruments; offense; penalties; effect of federal conviction.

JUDICIAL DECISIONS

0.5. Indictments.

Indictment charging a person with money laundering under Miss. Code Ann. § 97-23-101(1)(b)(ii)(1) was required to specify the “unlawful activity” from which the illegal proceeds were alleged to have derived, and violation of this requirement may be cured only where the prosecution demonstrated that it otherwise provided timely notice to defendant of the alleged illegal activity, and that the notice clearly and sufficiently provided defendant a fair opportunity to prepare a defense to the charges; the omission of the “specified unlawful activity” in defendant’s indictment was harmless error which did not render the trial fundamentally unfair.

Tran v. State, 962 So. 2d 1237 (Miss. 2007), writ of certiorari denied by 553 U.S. 1054, 128 S. Ct. 2472, 171 L. Ed. 2d 769, 2008 U.S. LEXIS 4212, 76 U.S.L.W. 3619 (2008).

One defendant’s conviction of money laundering was inappropriate under Miss. Code Ann. § 97-23-101(1)(b)(ii)(1) because the state failed to meet its burden of proof showing that defendant knew that the money at issue was hidden in a gas tank or that he knew that it represented proceeds of specified unlawful activity. *Tran v. State*, 963 So. 2d 1 (Miss. Ct. App. 2006), affirmed by 962 So. 2d 1237, 2007 Miss. LEXIS 475 (Miss. 2007).

§ 97-23-107. Residential mortgage fraud; elements of offense; establishing venue; penalties; forfeiture of all property used in or obtained through violation of section; pattern of residential mortgage fraud.

(1) A person commits the offense of residential mortgage fraud when, with the intent to defraud such person, he:

(a) Knowingly makes any deliberate misstatement, misrepresentation or omission during the mortgage lending process with the intention that it be relied on by a licensed mortgage broker or mortgage lender, borrower or any other party to the mortgage lending process;

(b) Knowingly uses or facilitates the use of any deliberate misstatement, misrepresentation or omission, knowing the same to contain a misstatement, misrepresentation or omission, during the mortgage lending process with the intention that it be relied on by a company, borrower, or any other party to the mortgage lending process;

(c) Receives any proceeds or any other funds in connection with a residential mortgage closing that such person knew resulted from a violation of paragraph (a) or (b) of this subsection;

(d) Conspires to violate any of the provisions of paragraph (a), (b) or (c) of this subsection; or

(e) Files or causes to be filed with the chancery clerk of any county of this state any deed of trust such person knows to contain a deliberate misstatement, misrepresentation or omission.

(2) An offense of residential mortgage fraud shall not be predicated solely upon information lawfully disclosed under federal disclosure laws, regulations and interpretations related to the mortgage lending process.

(3) For the purposes of venue under this section, any violation of this section shall be considered to have been committed:

(a) In the county in which the residential property for which a mortgage loan is being sought is located;

(b) In any county in which any act was performed in furtherance of this violation;

(c) In any county in which any person alleged to have violated this chapter had control or possession of any proceeds of this violation;

(d) If a closing occurred, in any county in which the closing occurred; or

(e) In any county in which a document containing a deliberate misstatement, misrepresentation or omission is filed with the chancery clerk.

(4) District attorneys and the Attorney General shall have the authority to conduct the criminal investigation of all cases of residential mortgage fraud under this section.

(5)(a) Any person violating this section shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not less than one (1) year nor more than ten (10) years, by a fine not to exceed Five Thousand Dollars (\$5,000.00), or both.

(b) If a violation of this section involves engaging or participating in a pattern of residential mortgage fraud or a conspiracy or endeavor to engage or participate in a pattern of residential mortgage fraud, the violation shall be punishable by imprisonment for not less than three (3) years nor more than twenty (20) years, by a fine not to exceed One Hundred Thousand Dollars (\$100,000.00), or both.

(c) Each residential property transaction subject to a violation of this section shall constitute a separate offense and shall not merge with any other crimes set forth in this section.

(6) All real and personal property of every kind used or intended for use in the course of, derived from, or realized through a violation of this section shall be subject to forfeiture to the state. Forfeiture shall be had by the same procedure as outlined in Sections 97-43-9 and 97-43-11. District attorneys and the Attorney General may commence forfeiture proceedings under this section.

(7) For purposes of this section, the term "pattern of residential mortgage fraud" means one or more violations of subsection (1) of this section that involve two (2) or more residential properties which have the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics.

SOURCES: Laws, 2007, ch. 581, § 31, eff from and after July 1, 2007.

CHAPTER 25

Offenses Affecting Railroads, Public Utilities and Carriers

SEC.

- 97-25-3. Meters; tampering with electric, gas or water meters.
97-25-4. Railroads; offenses committed on railroad right-of-way.
97-25-5. Railroads; destroying crossing-sign, gate or warning-signals.
97-25-35. Railroads; stealing or interfering with communications or signaling equipment.

§ 97-25-3. Meters; tampering with electric, gas or water meters.

Whoever, intentionally, by any means or device, prevents electric current, water or gas from passing through any meter or meters belonging to any person, firm or corporation engaged in the manufacture, sale or distribution of electricity, water or gas for lighting, power or other purposes, furnished such persons to register current or electricity, water or gas, passing through meters, or intentionally prevents the meter from duly registering the quantity of electricity, water or gas supplied, or in any manner interferes with its proper action or just registration, or, without the consent of such person, firm or corporation, intentionally diverts any electrical current from any wire or cable, or water or gas from any pipe or main of such person, firm or corporation, or otherwise intentionally uses, or causes to be used, without the consent of such person, firm or corporation, any electricity or gas manufactured, or water produced or distributed, by such person, firm or corporation, or any person, firm or corporation who retains possession of, or refuses to deliver any meter or meters, lamp or lamps, or other appliances which may be, or may have been, loaned them by any person, firm or corporation for the purpose of furnishing electricity, water or gas, through the same, with the intent to defraud such person, firm or corporation, shall be guilty of a misdemeanor and upon conviction, shall be punished by a fine of not less than One Hundred Dollars (\$100.00) and not more than Five Hundred Dollars (\$500.00), or by imprisonment in the county jail not more than three (3) months, or by both fine and imprisonment in the discretion of the court.

The presence at any time on or about such meter or meters, wire, cable, pipe or main of any device or unauthorized meter or pipe or wire resulting in the diversion of electric current, water or gas, as above defined, or resulting in the prevention of the proper action or just registration of the meter or meters as above set forth, the same being knowingly or intentionally installed, shall constitute prima facie evidence of knowledge on the part of the person, firm or corporation having custody or control of the room or place where such device or pipe or wire is located, or the existence thereof and the effect thereof, and shall constitute prima facie evidence of the intention on the part of such person, firm or corporation to defraud and shall bring such person, firm or corporation prima facie within the scope, meaning and penalties of this section.

Provided further, that if any person, firm or corporation engaged in the selling or delivering of any electric current, water or gas, to a consumer shall knowingly cause to be installed any meter or meters intentionally adjusted or regulated so as to cause such meter or meters to register a greater amount of such electric current, water or gas, than actually passes through the same, shall be prima facie evidence of the knowledge of such person, firm or corporation engaged in selling or delivering such electric current, water or gas, of the existence thereof and shall bring such person, firm or corporation within the scope and meaning of this section, and subject to the operation of this section. Provided further, any employee, stockholder, or member of the board of directors who, with intent to defraud a customer, falsifies, or acquiesces in the falsifying, of any record which results in billing in excess of the amount lawfully due and owing, shall be guilty of a misdemeanor and shall be fined not more than Five Hundred Dollars (\$500.00) or sentenced to serve not more than six (6) months in jail, or both.

Provided further, this section shall not relieve any person, firm or corporation from any other liabilities now imposed by law.

The governing authorities of any municipality are authorized to prosecute any violation of this section which is committed upon meters owned or operated by a utility which is owned or operated by a municipality.

SOURCES: Codes, 1930, § 1025; 1942, § 2257; Laws, 1922, ch. 271; Laws, 1932, ch. 268; Laws, 1981, ch. 541, § 3; Laws, 1984, ch. 338; Laws, 1992, ch. 385, § 1; Laws, 2009, ch. 397, § 1, eff from and after July 1, 2009.

Amendment Notes — The 2009 amendment substituted “Five Hundred Dollars (\$500.00)” for “Two Hundred Dollars (\$200.00)” near the end of the first paragraph; and inserted “of” following “selling or delivering” near the beginning of the third paragraph.

ATTORNEY GENERAL OPINIONS

Theft of electrical power from a municipal power company must be prosecuted in the court having jurisdiction over the location where the theft occurred, either in the appropriate Justice Court or in the Municipal Court having jurisdiction

where the theft occurred. A Justice Court may award restitution up to \$5,000, and a municipal court may order full restitution. Barton, March 2, 2007, A.G. Op. #07-00099, 2007 Miss. AG LEXIS 81.

§ 97-25-4. Railroads; offenses committed on railroad right-of-way.

(1) Except as otherwise provided in subsection (2) of this section, it shall be unlawful for any person to do any of the following acts without first having obtained written permission from the owner or operator of the railroad line:

- (a) To attempt to board or disembark from a moving freight train;
- (b) To damage or deface, or attempt to damage or deface, railroad track, signals, switches, buildings, structures, bridges, rights-of-way, wire lines, motive power, rolling stock or other property; or

(c) To dump, or cause to be dumped, upon railroad right-of-way any paper, ashes, sweepings, household wastes, glass, metal, tires, mattresses, furniture, dangerous substances or any other refuse or substance of any kind.

(2) Subsection (1) of this section shall not apply to:

(a) Railroad employees engaged in the performance of their duties; or

(b) Representatives of utilities or other agencies with easements across or along the railroad in the performance of their duties.

(3) Any person who violates the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof, be punished by imprisonment for not more than thirty (30) days or by a fine of not less than One Hundred Dollars (\$100.00) but not more than Four Hundred Dollars (\$400.00), or both, and may be required to pay any clean-up costs. In addition, any person who is convicted for a violation of subsection (1)(b) or subsection (1)(c) of this section shall be ordered by the court to make restitution to the owners or operators of the railroad line or property in an amount determined by the court to compensate for all damages caused by such person and all costs related to cleanup necessitated as a result of such person's unlawful conduct.

(4) The penalties provided for in this section shall be in addition to any other penalties provided by law for the same or similar acts.

(5) As used in this section the term "right-of-way" means track, roadbed and adjacent property which would be readily recognizable to a reasonable person as railroad property.

SOURCES: Laws, 2001, ch. 446, § 1; Laws, 2007, ch. 572, § 3, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment, in (3), substituted "One Hundred Dollars (\$100.00)" for "Fifty Dollars (\$50.00)" and "Four Hundred Dollars (\$400.00)" for "Two Hundred Fifty Dollars (\$250.00)," and made a minor stylistic change.

§ 97-25-5. Railroads; destroying crossing-sign, gate or warning-signals.

If any person shall willfully obliterate, injure or destroy any railroad-gate, warning-signals, cattle-gap or any board or sign erected or maintained by a railroad company in pursuance of law, he shall be fined not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00), or be imprisoned in the county jail not exceeding three (3) months, or both. In addition, any person who is convicted for a violation of this section shall be ordered by the court to make restitution to the owners or operators of the railroad line or property in an amount determined by the court to compensate for all damages caused by such person and all costs related to cleanup necessitated as a result of such person's unlawful conduct.

SOURCES: Codes, 1857, ch. 35, art. 39; 1871, § 2425; 1880, § 1051; 1892, § 1268; 1906, § 1343; Hemingway's 1917, § 1077; 1930, § 1107; 1942, § 2343; Laws, 1981, ch. 541, § 4; Laws, 2007, ch. 572, § 4, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment substituted “warning-signals” for “warning-strings” and added the last sentence.

§ 97-25-35. Railroads; stealing or interfering with communications or signaling equipment.

If any person shall maliciously remove, take, steal, change or in any manner interfere with any railroad transmission line, signaling device, microwave tower or any of the parts or attachments belonging to any communication or signaling device owned, leased or used by any railroad or transportation company, he shall, on conviction, be fined not more than Three Thousand Dollars (\$3,000.00), or shall be imprisoned not more than five (5) years, or both. In addition, any person who is convicted for a violation of this section shall be ordered by the court to make restitution to the owners or operators of the railroad line or property in an amount determined by the court to compensate for all damages caused by such person and all costs related to cleanup necessitated as a result of such person’s unlawful conduct.

SOURCES: Codes, 1942, § 2355.5; Laws, 1968, ch. 342, § 1; Laws, 1981, ch. 541, § 12; Laws, 2007, ch. 572, § 5, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment added the last sentence.

§ 97-25-47. Railroad trains, buses, trucks, motor vehicles, depots, stations, and other transportation facilities; wilfully shooting or throwing at.

JUDICIAL DECISIONS

2. Double jeopardy.
3. Guilty pleas.

2. Double jeopardy.

Defendant’s prosecutions for both shooting into a vehicle under Miss. Code Ann. § 97-25-47 and murder under Miss. Code Ann. § 97-3-19(1)(a), did not subject him to double jeopardy since the crimes charged required additional facts separate from each other; murder, unlike shooting into a vehicle, required the deliberate killing of an individual and did not require defendant to have shot into a vehicle, while shooting into a vehicle required only that defendant willfully shot into or at a vehicle. Further, the facts were such that it was not clear whether defendant shot into the vehicle when he killed the victim, as there was testimony to the effect that the victim may have had all or part of his head outside the vehicle when

he was shot; in essence, the facts were such that defendant could have been found guilty of murder and of shooting into a vehicle without any risk of exposure to double jeopardy. *Peacock v. State*, 970 So. 2d 197 (Miss. Ct. App. 2007).

Defendant’s claim of double jeopardy, pursuant to the Fifth Amendment, was without merit where application of the Blockburger test revealed that elements of each of the crimes of shooting into a vehicle, Miss. Code Ann. § 97-25-47, and aggravated assault, Miss. Code Ann. § 97-3-7(2) were not contained in the other. *Graves v. State*, 969 So. 2d 845 (Miss. 2007).

3. Guilty pleas.

In withdrawing defendant’s guilty plea for shooting into a vehicle under Miss. Code Ann. § 97-25-47, the trial court found that the evidence offered for defen-

dant's guilt at the plea colloquy was inconsistent with the facts charged in the indictment. The trial court stated that additional evidence should have been elicited to make the proof offered conform with the indictment; since the evidence

was only that defendant shot at a vehicle and not into a vehicle, the trial court properly set aside the guilty plea. *Peacock v. State*, 970 So. 2d 197 (Miss. Ct. App. 2007).

§ 97-25-53. Telegraphs and telephones; injuring or destroying lines; interrupting communications; stealing or destroying fixtures.

JUDICIAL DECISIONS

1. In general.

In a case in which a utility installer appealed a circuit court's entry of summary judgment in favor of a telecommunications company and a company employee in regards to his claim of malicious prosecution, since the charge that he had violated Miss. Code Ann. § 97-25-53 was

dismissed for lack of jurisdiction, that dismissal did not provide a basis for the installer's malicious prosecution claim. The dismissal of the case for lack of jurisdiction was not a termination in the installer's favor. *Bearden v. BellSouth Telcoms., Inc.*, 29 So. 3d 761 (Miss. 2010).

§ 97-25-54. Theft of telephone and other communication services prohibited; definitions; manufacture and possession of devices to facilitate theft prohibited; penalties.

JUDICIAL DECISIONS

1. Evidence.

Although defendant used the victim's phone following her death—making and receiving some 60 calls while using the phone—the evidence was insufficient to support defendant's conviction of felony theft of telecommunication services because the State failed to present any evi-

dence to establish that the value of the services obtained or diverted by defendant exceeded \$50. Nevertheless, despite this failure of proof, the evidence was sufficient to support a conviction of the lesser offense of misdemeanor theft of telecommunications services. *Bartolo v. State*, 32 So. 3d 522 (Miss. Ct. App. 2009).

CHAPTER 27

Crimes Affecting Public Health

SEC.

97-27-14.

Contagious diseases; causing exposure to human immunodeficiency virus (HIV), hepatitis B or hepatitis C; crime of endangerment by bodily substance; violations and penalties.

§ 97-27-14. Contagious diseases; causing exposure to human immunodeficiency virus (HIV), hepatitis B or hepatitis C; crime of endangerment by bodily substance; violations and penalties.

(1) It shall be unlawful for any person to knowingly expose another person to human immunodeficiency virus (HIV), hepatitis B or hepatitis C. Prior knowledge and willing consent to the exposure is a defense to a charge brought under this paragraph. A violation of this subsection shall be a felony.

(2)(a) A person commits the crime of endangerment by bodily substance if the person attempts to cause or knowingly causes a corrections employee, a visitor to a correctional facility or another prisoner or offender to come into contact with blood, seminal fluid, urine, feces or saliva.

(b) As used in this subsection, the following definitions shall apply unless the context clearly requires otherwise:

(i) "Corrections employee" means a person who is an employee or contracted employee of a subcontractor of a department or agency responsible for operating a jail, prison, correctional facility or a person who is assigned to work in a jail, prison or correctional facility.

(ii) "Offender" means a person who is in the custody of the Department of Corrections.

(iii) "Prisoner" means a person confined in a county or city jail.

(c) A violation of this subsection is a misdemeanor unless the person violating this section knows that he is infected with human immunodeficiency virus (HIV), hepatitis B or hepatitis C, in which case it is a felony.

(3) Any person convicted of a felony violation of this section shall be imprisoned for not less than three (3) years nor more than ten (10) years and a fine of not more than Ten Thousand Dollars (\$10,000.00), or both.

(4) Any person guilty of a misdemeanor violation of this section shall be punished by imprisonment in the county jail for up to one (1) year and may be fined One Thousand Dollars (\$1,000.00), or both.

(5) The provisions of this section shall be in addition to any other provisions of law for which the actions described in this section may be prosecuted.

SOURCES: Laws, 2004, ch. 468, § 1; Laws, 2007, ch. 490, § 1, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment rewrote the section to create the crime of endangerment by bodily substance.

CHAPTER 29

Crimes Against Public Morals and Decency

IN GENERAL

SEC.

- 97-29-31. Indecent exposure.
- 97-29-61. Voyeurism; trespass by "peeping Tom"; when victim is adult; when victim is child under sixteen.
- 97-29-63. Photographing or filming another without permission where there is expectation of privacy; when victim is adult; when victim is child under sixteen.

§ 97-29-5. Adultery and fornication; between certain persons forbidden to inter-marry.

JUDICIAL DECISIONS

1. In general.

With respect to defendant who pleaded guilty to incest, a day-for-day 10-year sentence and \$10,000 fine did not exceed the statutory maximum because he was not eligible for parole under Miss. Code Ann.

§ 47-7-3(1)(b) or for earned time allowance under Miss. Code Ann. § 47-5-139(1)(d), and the fine was authorized under Miss. Code Ann. § 99-19-32(1). *Cochran v. State*, 969 So. 2d 119 (Miss. Ct. App. 2007).

§ 97-29-13. Bigamy; definition; penalty.

RESEARCH REFERENCES

ALR. Validity of Bigamy and Polygamy Statutes and Constitutional Provisions. 22 A.L.R. 6th 1.

§ 97-29-15. Bigamy; exceptions.

RESEARCH REFERENCES

ALR. Validity of Bigamy and Polygamy Statutes and Constitutional Provisions. 22 A.L.R. 6th 1.

§ 97-29-31. Indecent exposure.

A person who willfully and lewdly exposes his person, or private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, is guilty of a misdemeanor and, on conviction for a first offense, shall be punished by a fine not exceeding Five Hundred Dollars (\$500.00) or be imprisoned not exceeding six (6) months, or both. Upon conviction for a second offense within five (5) years, such person shall be guilty of a misdemeanor and shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00) or shall be imprisoned not exceeding one (1) year, or both. Upon conviction of a third or subsequent offense within five (5) years, such person shall be guilty of a felony and shall be punished by

a fine of not more than Five Thousand Dollars (\$5,000.00) or shall be imprisoned for not more than five (5) years in the State Penitentiary, or both. It is not a violation of this statute for a woman to breast-feed.

SOURCES: Codes, 1892, § 1218; 1906, § 1294; Hemingway's 1917, § 1027; 1930, § 1058; 1942, § 2290; Laws, 1971, ch. 448, § 1; Laws, 2006, ch. 520, § 5; Laws, 2012, ch. 510, § 2, eff from and after July 1, 2012.)

Amendment Notes — The 2012 amendment inserted “for a first offense” preceding “shall be punished by a fine not exceeding” in the first sentences; and added the second and third sentences.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor or felony violation, see § 99-19-73.

JUDICIAL DECISIONS

3. Jury instructions.

In a case in which defendant was convicted of enticing a child for sexual purposes, defendant was not entitled to a lesser included offense instruction on misdemeanor indecent exposure; based on the

overwhelming evidence, no reasonable jury could have found defendant not guilty of any element of the principal charge. Delashmit v. State, 991 So. 2d 1215 (Miss. 2008).

§ 97-29-43. Polygamy; teaching of.

RESEARCH REFERENCES

ALR. Validity of Bigamy and Polygamy Statutes and Constitutional Provisions. 22 A.L.R. 6th 1.

§ 97-29-61. Voyeurism; trespass by “peeping Tom”; when victim is adult; when victim is child under sixteen.

(1) Any person who enters upon real property whether the original entry is legal or not, and thereafter pries or peeps through a window or other opening in a dwelling or other building structure for the lewd, licentious and indecent purpose of spying upon the occupants thereof, shall be guilty of a felonious trespass, and upon conviction shall be imprisoned in the custody of the Department of Corrections not more than five (5) years.

(2) When one or more occupants spied upon is a child under sixteen (16) years of age, a person who violates subsection (1) of this section shall be guilty of felonious trespass, and upon conviction shall be imprisoned in the custody of the Department of Corrections not more than ten (10) years.

SOURCES: Codes, 1942, § 2412.5; Laws, 1958, ch. 281; Laws, 1980, ch. 391; Laws, 2012, ch. 557, § 1, eff from and after July 1, 2012.

Amendment Notes — The 2012 amendment added the (1) designation, and therein substituted “custody of the Department of Corrections” for “state penitentiary” near the end; and added (2).

JUDICIAL DECISIONS

2. Evidence.
3. Sentencing.

2. Evidence.

Court found a factual basis to establish the charges against an inmate for voyeurism under Miss. Code Ann. § 97-29-61 and touching a child for lustful purposes under Miss. Code Ann. § 97-5-23(1), given that (1) the inmate admitted the facts that surrounded the elements for both of the crimes, (2) the inmate’s daughter reported the same story to her grandmother and others, and (3) the daughter provided sufficient facts and detail to support the charges. *Gaddy v. State*, 21 So. 3d 677

(Miss. Ct. App. 2009), writ of certiorari denied by 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (U.S. 2010).

3. Sentencing.

Terms of an inmate’s sentences were within the statutory limits of Miss. Code Ann. §§ 97-29-61, 97-5-23(1) and thus the claim that the trial court erred in sentencing the inmate to maximum sentences was without merit. *Gaddy v. State*, 21 So. 3d 677 (Miss. Ct. App. 2009), writ of certiorari denied by 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (U.S. 2010).

§ 97-29-63. Photographing or filming another without permission where there is expectation of privacy; when victim is adult; when victim is child under sixteen.

(1) Any person who with lewd, licentious or indecent intent secretly photographs, films, videotapes, records or otherwise reproduces the image of another person without the permission of such person when such a person is located in a place where a person would intend to be in a state of undress and have a reasonable expectation of privacy, including, but not limited to, private dwellings or any facility, public or private, used as a restroom, bathroom, shower room, tanning booth, locker room, fitting room, dressing room or bedroom shall be guilty of a felony and upon conviction shall be punished by a fine of Five Thousand Dollars (\$5,000.00) or by imprisonment of not more than five (5) years in the custody of the Department of Corrections, or both.

(2) Where the person who is secretly photographed, filmed, videotaped or otherwise reproduced is a child under sixteen (16) years of age, a person who violates subsection (1) of this section shall be guilty of a felony and upon conviction shall be punished by a fine of Five Thousand Dollars (\$5,000.00) or by imprisonment of not more than ten (10) years in the custody of the Department of Corrections, or both.

SOURCES: Laws, 1999, ch. 514, § 2; Laws, 2012, ch. 557, § 2, eff from and after July 1, 2012.

Amendment Notes — The 2012 amendment added the (1) designation and (2).

CHAPTER 31

Intoxicating Beverage Offenses

SEC.

97-31-49. Solicitation of orders for liquors, etc. unlawful.

§ 97-31-49. Solicitation of orders for liquors, etc. unlawful.

It shall be unlawful for any person, firm or corporation in this state, in person, by letter, circular, or other printed or written matter, or in any other manner, to solicit or take order in this state for any liquors, bitters or drinks prohibited by the laws of this state to be sold, bartered, or otherwise disposed of. The inhibition of this section shall apply to such liquors, bitters and drinks, whether the parties intend that the same shall be shipped into this state from outside of the state, or from one point in this state to another point in this state. If such order be in writing, parol evidence thereof is admissible without producing or accounting for the absence of the original; and the taking or soliciting of such orders is within the inhibition of this section, although the orders are subject to approval by some other person, and no part of the price is paid, nor any part of the goods is delivered when the order is taken.

SOURCES: Codes, Hemingway's 1921 Supp. § 2163g; 1930, § 2006; 1942, § 2645; Laws, 1918, ch. 189.

CHAPTER 32

Tobacco Offenses

Article 1. Mississippi Juvenile Tobacco Access Prevention Act 97-32-1

ARTICLE 1.

MISSISSIPPI JUVENILE TOBACCO ACCESS PREVENTION ACT.

SEC.

97-32-9. Juvenile purchase, possession and consumption of tobacco.

§ 97-32-5. Prohibition of the sale or transfer of tobacco products to persons under 18 years of age.

Editor's Note — Section 27-3-4 provides that the terms "Mississippi State Tax Commission," "State Tax Commission," "Tax Commission" and "commission" appearing in the laws of this state in connection with the performance of the duties and functions by the Mississippi State Tax Commission, the State Tax Commission or Tax Commission shall mean the Department of Revenue."

§ 97-32-9. Juvenile purchase, possession and consumption of tobacco.

No person under eighteen (18) years of age shall purchase any tobacco product. No student of any high school, junior high school or elementary school shall possess tobacco on any educational property as defined in Section 97-37-17.

(a) If a person under eighteen (18) years of age is found by a court to be in violation of any other statute and is also found to be in possession of a tobacco product, the court may order the minor to perform up to three (3) hours of community service, in addition to any other punishment imposed by the court.

(b) A violation under this section is not to be recorded on the criminal history of the minor and, upon proof of satisfaction of the court's order, the record shall be expunged from any records other than youth court records.

SOURCES: Laws, 1997, ch. 578, § 5; Laws, 2012, ch. 533, § 1, eff from and after July 1, 2012.

Amendment Notes — The 2012 amendment added (a) and (b).

CHAPTER 33

Gambling and Lotteries

Charitable Bingo Law 97-33-50

IN GENERAL

§ 97-33-1. Betting, gaming or wagering; exception from prohibition; penalty.

ATTORNEY GENERAL OPINIONS

<p>Conduct of a poker tournament constitutes gaming and gambling under Section 97-33-1 and the Gaming Control Act, and is prohibited unless conducted by a li-</p>	<p>censee of the Mississippi Gaming Commission. Janus, Mar. 25, 2005, A.G. Op. 05-0080.</p>
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§ 97-33-7. Gambling devices defined; prohibition; pin ball machines; penalties; exceptions.

JUDICIAL DECISIONS

<p>3. Search, seizure and confiscation. As computer terminals seized from an internet cafe were illegal slot machines,</p>	<p>cafe owners had no property rights in them pursuant to Miss. Code Ann. § 97-33-7(2); thus, a justice court had no legal</p>
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basis to order their return to the owners.
 Moore v. Miss. Gaming Comm'n, 64 So. 3d
 537 (Miss. Ct. App. 2011).

RESEARCH REFERENCES

Law Reviews. Symposium: Gaming Law and Technology: Gambling in the Twenty-First Century: Judicial Resolu-
 tion of Current Issues, 74 Miss. L.J. 779,
 Winter, 2005.

CHARITABLE BINGO LAW

- SEC.
- | | |
|------------|----------------------------------------------------------------------------------------------------------------------------------------------|
| 97-33-57. | Investigation of qualifications of applicants for licenses; criteria; term of license; denial, refusal, suspension or revocation of license. |
| 97-33-109. | Monitoring of licensees; enforcement powers and actions; prosecutions; penalties. |

§ 97-33-51. Exemptions for certain bingo games and raffles.

Cross References — Posts of the American Legion and posts of the Veterans of Foreign Wars of the United States may utilize nonmembers to assist designated supervisors in the conduct of bingo under the Charitable Bingo Law and qualify for exemption from regulation of charitable solicitations, see § 79-11-505.

§ 97-33-57. Investigation of qualifications of applicants for licenses; criteria; term of license; denial, refusal, suspension or revocation of license.

(1) The commission shall investigate the qualifications of each applicant and the merits of the application, with due expedition after the filing of the application, and shall make the following determinations:

(a) That the applicant is duly qualified to hold, operate and conduct bingo games under the provisions of Sections 97-33-51 through 97-33-203 and the rules and regulations of the commission governing same.

(b) That the member or members of the organization designated in the application to hold, operate, conduct, or assist in holding, operating, or conducting, the bingo games are bona fide active members of the organization and of good moral character, who have never been convicted of certain offenses as designated by the commission.

(c) That bingo games are to be held, operated and conducted in accordance with the provisions of Sections 97-33-51 through 97-33-203 and in accordance with the rules and regulations of the commission governing same, and that the proceeds thereof are to be disposed of as provided by Sections 97-33-51 through 97-33-203.

(2) If the commission is satisfied that no commission, salary, compensation, reward or recompense whatever, except as otherwise provided in Section 97-33-69, will be paid or given to any person holding, operating or conducting any bingo game, it may issue a license to the applicant for the holding, operating and conducting of bingo games.

(3) No license for holding, operating or conducting bingo games that is issued under Sections 97-33-51 through 97-33-203 shall be effective for more than three (3) calendar years.

(4) The commission shall not issue a license to:

(a) Any person who has been convicted of certain related offenses as established by the commission or who presently has such a charge pending in any state or federal court;

(b) Any person who has ever been convicted of a gambling-related offense in any state or federal court;

(c) Any person who is or has ever been a professional gambler;

(d) Any firm, organization or corporation in which any person as described in paragraphs (a) through (c) is an officer or director, whether compensated or not, or in which such person has a direct or indirect financial interest;

(e) The commission may deny an application for licensure, refuse to renew a license, or suspend or revoke a license for any reason consistent with the purposes of Sections 97-33-51 through 97-33-203 which it deems to be in the interest of the public. However, policies regarding such denial, suspension, revocation or refusal to renew shall be established by rule and regulation. If the commission fails to act upon the license application within sixty (60) days of the date of filing of the application by the charitable organization, such application shall be deemed accepted.

(5) Any significant change in the information submitted on its application for licensure shall be filed by a licensee with the commission within ten (10) days of the change. A significant change shall include, but not be limited to, any change in the officers, directors, managers, proprietors or persons having a direct or indirect financial interest in any licensed organization or entity.

SOURCES: Laws, 1992, ch. 581, § 6; Laws, 1994, ch. 635, § 4; Laws, 2007, ch. 542, § 1, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment substituted “three (3) calendar years” for “one (1) calendar year” in (3); and made a minor stylistic change.

§ 97-33-73. Gaming and Tax Commissions may examine books and records.

Editor’s Note — Section 27-3-4 provides that the terms “Mississippi State Tax Commission,” “State Tax Commission,” “Tax Commission” and “commission” appearing in the laws of this state in connection with the performance of the duties and functions by the Mississippi State Tax Commission, the State Tax Commission or Tax Commission shall mean the Department of Revenue.”

§ 97-33-109. Monitoring of licensees; enforcement powers and actions; prosecutions; penalties.

(1) The commission shall monitor the conduct or business of licensees, both on a routine scheduled and an unscheduled basis, to the extent necessary

to ensure compliance with the provisions of charitable bingo game laws and regulations of the state.

(2) In carrying out its enforcement responsibilities, the commission may:

(a) Inspect and examine all premises in which charitable bingo games are conducted or supplies or equipment for such games are manufactured and distributed;

(b) Inspect all such supplies and equipment in, upon or about such premises;

(c) Seize and remove from such premises and impound such supplies and equipment for the purpose of examination and inspection pursuant to an appropriate court order;

(d) Demand access to and audit and inspect books and records of licensees for the purpose of determining compliance with laws and regulations relative to charitable bingo games;

(e) Conduct in-depth audits and investigations; and

(f) Mandate that internal controls be executed in accordance with the provisions of the Charitable Bingo Law and other applicable laws and regulations.

(3) The commission shall require licensees to maintain records and submit reports.

(4) In addition to license revocation or suspension or any criminal penalty imposed, the commission may assess a fine against any person who violates any law or regulation relative to charitable bingo games. Such a fine shall only be assessed after notice and an opportunity for a hearing to be held.

(5) All departments, commissions, boards, agencies, officers and institutions of the state, and all subdivisions thereof, shall cooperate with the commission in carrying out its enforcement responsibilities.

(6) Except as otherwise authorized in Section 7-5-39, the Attorney General shall be the attorney for the commission in regard to its duties to regulate the Charitable Bingo Law and he shall represent it in all legal proceedings and shall prosecute any civil action for a violation of the provisions of Sections 97-33-51 through 97-33-203 or the rules and regulations of the commission.

(7) It is the duty of the sheriffs, deputy sheriffs and police officers of this state to assist the commission in the enforcement of the provisions of Sections 97-33-51 through 97-33-203 and to arrest and complain against any person violating the provisions of Sections 97-33-51 through 97-33-203. It is the duty of the district attorneys of this state to prosecute all violations of the provisions of Sections 97-33-51 through 97-33-203 if requested to do so by the commission.

(8)(a) Whenever any person who is a resident of the State of Mississippi has reason to believe that a person or organization is or has violated the provisions of Sections 97-33-51 through 97-33-203 and that proceedings would be in the public interest, he may bring an action in the name of the state against such person to restrain by temporary or permanent injunction such violation, upon at least five (5) days' summons before the hearing of the action. The action shall be brought in the chancery or county court of the county in which such violation has occurred or, with consent of the parties,

may be brought in the chancery or county court of the county in which the State Capitol is located. The said courts are authorized to issue temporary or permanent injunctions to restrain and prevent violations of Sections 97-33-51 through 97-33-203, and such injunctions shall be issued without bond.

(b) Any person who violates the terms of an injunction issued under this subsection shall forfeit and pay to the state a civil penalty of not more than Five Thousand Dollars (\$5,000.00) per violation which shall be payable to the General Fund of the State of Mississippi. For the purposes of this subsection, the chancery or county court issuing an injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the person bringing the action may petition for recovery of civil penalties.

(c) In any action brought under this subsection, if the court finds that a person is willfully violating the provisions of Sections 97-33-51 through 97-33-203, the person bringing the action, upon petition to the court, may recover on behalf of the state a civil penalty of not exceeding Five Hundred Dollars (\$500.00) per violation which shall be payable to the General Fund of the State of Mississippi.

(d) No penalty authorized by this subsection shall be deemed to limit the court's powers to insure compliance with its orders, decrees and judgments, or punish for the violations thereof.

(e) For purposes of this subsection, a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of the provisions of Sections 97-33-51 through 97-33-203.

SOURCES: Laws, 1992, ch. 581, § 22; Laws, 1994, ch. 635, § 18; Laws, 2012, ch. 546, § 43, eff from and after July 1, 2012.

Amendment Notes — The 2012 amendment added the exception at the beginning of (6).

CHAPTER 35

Crimes Against Public Peace and Safety

SEC.

97-35-3.	Repealed.
97-35-18.	Disturbance by disruptive protest of funeral, burial service, or memorial service.
97-35-47.	False reporting of crime.
97-35-51.	Obstructing access to emergency assistance; penalties.

§ 97-35-3. Repealed.

Repealed by Laws, 2009, ch. 369, § 2, effective upon approval (March 17, 2009).

§ 97-35-3. [Codes, 1942, § 2087.5; Laws, 1960, ch. 250, §§ 1, 2; Laws, 2006, ch. 520, § 6, eff from and after passage (approved Apr. 3, 2006.)]

Editor's Note — Former § 97-35-3 prohibited certain activities as disorderly conduct.

§ 97-35-7. Disorderly conduct; failure to comply with requests or commands of law enforcement officers; penalties; exception.

JUDICIAL DECISIONS

1. In general.
2. Sufficiency of evidence.

1. In general.

Officer had reasonable suspicion to investigate a suspicious white vehicle following a report of a vehicle theft, and then probable cause to detain its occupants for further questioning in light of their failure to respond and resisting arrest. *Qualls v. State*, 947 So. 2d 365 (Miss. Ct. App. 2007).

during a police pursuit of the driver of a stolen vehicle, a city was properly granted summary judgment because the passengers were engaged in criminal activity, as there was no dispute that they knew that the car was stolen and that they encouraged the driver to flee from the police, in violation of Miss. Code Ann. § 97-35-7(2). *McCoy v. City of Florence*, 949 So. 2d 69 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

2. Sufficiency of evidence.

In a wrongful death action filed by the parents of two passengers who were killed

§ 97-35-15. Disturbance of the public peace or the peace of others; exception.

JUDICIAL DECISIONS

2. Construction and application.

Grant of summary judgment in favor of the employer and against the employees was appropriate in part because, even if it was found that the supervisor had violated Miss. Code Ann. § 97-35-15 or Miss. Code Ann. § 97-35-3, the issue failed to

rise to the necessary level to fit into the exceptions to the employment-at-will doctrine; there was no evidence that the supervisor's conduct was reported because it was illegal. *Jones v. Fluor Daniel Servs. Corp.*, 959 So. 2d 1044 (Miss. 2007).

§ 97-35-18. Disturbance by disruptive protest of funeral, burial service, or memorial service.

(1) For purposes of this section, the following terms shall have the following meanings:

(a) "Funeral ceremony" means a service or rite commemorating the deceased with the body present.

(b) "Funeral service" means any services which may be used to:

(i) Care for and prepare dead human bodies for burial, cremation or other final disposition; and

(ii) Arrange, supervise, or conduct the funeral ceremony or the final disposition of dead human bodies.

(c) “Graveside service” means a service or rite, conducted at the place of interment, commemorating the deceased with the body present.

(d) “Memorial service” means a ceremony or rite commemorating the deceased without the body present.

(e) “Targeted residential picketing” includes the following acts when committed on more than one (1) occasion:

(i) Marching, standing or patrolling by one or more persons directed solely at a particular residential building in a manner that adversely affects the safety, security or privacy of an occupant of the building; or

(ii) Marching, standing or patrolling by one or more persons which prevents an occupant of a residential building from gaining access to or exiting from the property on which the residential building is located.

(2)(a) Whoever does any of the following shall be guilty of a misdemeanor:

(i) With intent to disrupt a funeral service, graveside service, memorial service, or funeral ceremony, protests or pickets within 1,000 feet of the location or locations at which the service or ceremony is being conducted within one (1) hour before, during, and one (1) hour following the service or ceremony;

(ii) With intent to disrupt a funeral procession impedes vehicles that are part of the funeral procession;

(iii) Intentionally blocks access to a funeral service, funeral ceremony, graveside service or memorial service; or

(iv) Engages in targeted residential picketing at the home or domicile of any surviving member of the deceased person’s immediate family on the date of the service or ceremony, and upon conviction thereof, shall be punished by a fine of not more than Five Hundred Dollars (\$500.00), or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

(b) Whoever is convicted of a second or subsequent violation of paragraph (a) shall be guilty of a gross misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00), or by imprisonment in the county jail for not more than one (1) year, or by both such fine and imprisonment. For purposes of this paragraph, a second or subsequent violation includes a violation of a statute from another state in conformity with this statute.

(3) In addition to the criminal penalties provided in subsection (2) of this section, the court may enjoin conduct prohibited in subsection (2) of this section, and may in such proceeding award damages, including attorney fees or other appropriate relief against a person, if there is credible evidence that the person has violated, or is likely to violate, subsection (2) of this section. Any surviving member of the deceased person’s immediate family who is damaged or threatened with loss or injury by reason of a violation described in subsection (2) of this section is entitled to sue for and have injunctive relief and appropriate remedial compensation in any court of competent jurisdiction against any damage or threatened loss or injury by reason of a violation thereof.

SOURCES: Laws, 2006, ch. 591, § 1, eff from and after July 1, 2006.

§ 97-35-47. False reporting of crime.

It shall be unlawful for any person to report a crime or any element of a crime to any law enforcement or any officer of any court, by any means, knowing that such report is false. A violation of this section shall be punishable by imprisonment in the county jail not to exceed one (1) year or by fine not to exceed Five Thousand Dollars (\$5,000.00), or both. In addition to any fine and imprisonment, and upon proper showing made to the court, the defendant shall be ordered to pay as restitution to the law enforcement agency reimbursement for any reasonable costs directly related to the investigation of the falsely reported crime and the prosecution of any person convicted under this section.

SOURCES: Laws, 2000, ch. 387, § 1; Laws, 2012, ch. 518, § 1, eff from and after July 1, 2012.

Editor’s Note — Chapter 518 Laws of 2012, which amended this section and enacted § 99-43-8 , is known as the Broderick Rashad Danti Dixon Act.

Amendment Notes — The 2012 amendment substituted “Five Thousand Dollars (\$5,000.00)” for “One Thousand Dollars (\$1,000.00)” at the end of the second sentence.

§ 97-35-51. Obstructing access to emergency assistance; penalties.

Any person who verbally or physically obstructs, prevents, or hinders another person from seeking or receiving emergency medical assistance, emergency assistance from a third party, or emergency assistance from law enforcement or other emergency personnel, with the intent to cause or allow physical harm or injury to that person is guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not to exceed One Thousand Dollars (\$1,000.00) or imprisonment not to exceed six (6) months, or both.

SOURCES: Laws, 2011, ch. 306, § 1, eff from and after July 1, 2011.

CHAPTER 37

Weapons and Explosives

General Provisions	97-37-1
Honesty in Purchasing Firearms Act	97-37-101

GENERAL PROVISIONS

SEC.	
97-37-1.	Deadly weapons; carrying while concealed; use or attempt to use; penalties.
97-37-5.	Unlawful for convicted felon to possess any firearms, or other weapons or devices; penalties; exceptions.

- 97-37-7. Deadly weapons; persons permitted to carry weapons; bond; permit to carry weapon; grounds for denying application for permit; required weapons training course; reciprocal agreements.
- 97-37-11. Repealed.
- 97-37-17. Possession of weapons by students; aiding or encouraging.
- 97-37-30. Willful discharge of a firearm toward the dwelling of another causing damage to property or domesticated animal or livestock.
- 97-37-37. Enhanced penalty for use of firearm during commission of felony.

§ 97-37-1. Deadly weapons; carrying while concealed; use or attempt to use; penalties.

(1) Except as otherwise provided in Section 45-9-101, any person who carries, concealed in whole or in part, any bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, slingshot, pistol, revolver, or any rifle with a barrel of less than sixteen (16) inches in length, or any shotgun with a barrel of less than eighteen (18) inches in length, machine gun or any fully automatic firearm or deadly weapon, or any muffler or silencer for any firearm, whether or not it is accompanied by a firearm, or uses or attempts to use against another person any imitation firearm, shall upon conviction be punished as follows:

(a) By a fine of not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00), or by imprisonment in the county jail for not more than six (6) months, or both, in the discretion of the court, for the first conviction under this section.

(b) By a fine of not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00), and imprisonment in the county jail for not less than thirty (30) days nor more than six (6) months, for the second conviction under this section.

(c) By confinement in the custody of the Department of Corrections for not less than one (1) year nor more than five (5) years, for the third or subsequent conviction under this section.

(d) By confinement in the custody of the Department of Corrections for not less than one (1) year nor more than ten (10) years for any person previously convicted of any felony who is convicted under this section.

(2) It shall not be a violation of this section for any person over the age of eighteen (18) years to carry a firearm or deadly weapon concealed in whole or in part within the confines of his own home or his place of business, or any real property associated with his home or business or within any motor vehicle.

(3) It shall not be a violation of this section for any person to carry a firearm or deadly weapon concealed in whole or in part if the possessor of the weapon is then engaged in a legitimate weapon-related sports activity or is going to or returning from such activity. For purposes of this subsection, "legitimate weapon-related sports activity" means hunting, fishing, target shooting or any other legal sports activity which normally involves the use of a firearm or other weapon.

SOURCES: Codes, 1880, § 2985; 1892, § 1026; 1906, § 1103; Hemingway's 1917, § 829; 1930, § 853; 1942, § 2079; Laws, 1898, p. 86; Laws, 1960, ch. 242, § 1; Laws, 1962, ch. 310, § 1; Laws, 1991, ch. 609, § 4; Laws, 2007, ch. 530, § 1, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment, in (1), substituted “confinement in the custody of the Department of Corrections” for “imprisonment in the State Penitentiary” in (c) and (d), substituted “third or subsequent conviction” for “third or more convictions” in (c), and substituted “ten (10) years” for “five (5) years” in (d).

JUDICIAL DECISIONS

3. Concealment; mode of carrying.

Where an inmate's guilty plea for carrying a concealed weapon was based on the inmate's action of having a pistol under a blanket in a van, counsel was ineffective for allowing the inmate to plead guilty because there was no factual basis for the charge since Miss. Code Ann. § 97-37-1(2) allowed the inmate to possess a concealed

firearm or deadly weapon within any motor vehicle. *Knight v. State*, 983 So. 2d 348 (Miss. Ct. App. 2008), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 267 (Miss. 2008), writ of certiorari denied by 555 U.S. 998, 129 S. Ct. 492, 172 L. Ed. 2d 363, 2008 U.S. LEXIS 8079, 77 U.S.L.W. 3265 (2008).

RESEARCH REFERENCES

ALR. Cigarette Lighter as Deadly or Dangerous Weapon. 22 A.L.R. 6th 533.

§ 97-37-5. Unlawful for convicted felon to possess any firearms, or other weapons or devices; penalties; exceptions.

(1) It shall be unlawful for any person who has been convicted of a felony under the laws of this state, any other state, or of the United States to possess any firearm or any bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, or any muffler or silencer for any firearm unless such person has received a pardon for such felony, has received a relief from disability pursuant to Section 925(c) of Title 18 of the United States Code, or has received a certificate of rehabilitation pursuant to subsection (3) of this section.

(2) Any person violating this section shall be guilty of a felony and, upon conviction thereof, shall be fined not more than Five Thousand Dollars (\$5,000.00), or committed to the custody of the State Department of Corrections for not less than one (1) year nor more than ten (10) years, or both.

(3) A person who has been convicted of a felony under the laws of this state may apply to the court in which he was convicted for a certificate of rehabilitation. The court may grant such certificate in its discretion upon a showing to the satisfaction of the court that the applicant has been rehabilitated and has led a useful, productive and law-abiding life since the completion of his sentence and upon the finding of the court that he will not be likely to act in a manner dangerous to public safety.

SOURCES: Codes, 1880, § 2985; 1892, § 1026; 1906, § 1103; Hemingway's 1917, § 829; 1930, § 853; 1942, § 2079; Laws, 1898, p. 86; Laws, 1960, ch. 242, § 1; Laws, 1962, ch. 310, § 1; Laws, 1993, ch. 482, § 1; Laws, 2007, ch. 322, § 1; Laws, 2007, ch. 530, § 2, eff from and after July 1, 2007.

Joint Legislative Committee Note — Section 1 of ch. 322, Laws of 2007, effective July 1, 2007 (approved March 13, 2007), amended this section. Section 2 of ch. 530, Laws of 2007, effective July 1, 2007 (approved April 18, 2007), also amended this section. As set out above, this section reflects the language of Section 2 of ch. 530, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Amendment Notes — The first 2007 amendment (ch. 322), substituted “ten (10) years” for “three (3) years” at the end of (2).

The second 2007 amendment (ch. 530), substituted “not less than one (1) year nor more than ten (10) years” for “not more than three (3) years” near the end of (2).

JUDICIAL DECISIONS

1. In general.
3. Construction.
- 3.5. Admission of evidence.
4. Jury instructions.
- 5.5. Insufficient evidence.
6. Sufficient evidence.
7. “Convicted felon.”
8. Directed verdict.

1. In general.

Amendment to an indictment to change the crime that defendant was previously convicted of from murder to manslaughter was not a substantive change since it would not have mattered what felony defendant was previously convicted of for the crime of possession of a firearm by a felon. *Speagle v. State*, 956 So. 2d 237 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 296 (Miss. 2007).

3. Construction.

Insufficient evidence was presented at trial to support a guilty verdict on a felon in possession of a knife count because the pocket knife that was used in an altercation was not one of the weapons that Miss. Code Ann. § 97-37-5(1) deemed unlawful for a convicted felon to possess. The knife was a small ordinary pocket knife with a two-and-a-half-inch blade. *Williams v. State*, 37 So. 3d 717 (Miss. Ct. App. 2010).

3.5. Admission of evidence.

Where a witness testified that defendant was parked on his property, he saw a

shotgun underneath the car seat and threw it into a ditch; a deputy testified that he retrieved the shotgun from the ditch and locked in it his trunk until he turned it over to the sheriff. The shotgun was then placed in the evidence locker where it remained until an employee of the sheriff's office brought it to court on the morning of the trial; the testimony was sufficient to establish the chain of custody so that the shotgun was properly admitted into evidence during defendant's trial for possession of a firearm by a convicted felon in violation of Miss. Code Ann. § 97-37-5(1). *Cooley v. State*, 14 So. 3d 63 (Miss. Ct. App. 2008).

4. Jury instructions.

Defendant was not entitled to a jury instruction on self-defense because self-defense was not a viable defense to possession of a firearm by a convicted felon. Possession of a firearm by a convicted felon was a criminal act void of a third party to defend against. *Roberson v. State*, 19 So. 3d 95 (Miss. Ct. App. 2009).

Defendant, in his trial for being a felon in possession of a firearm, argued that a State proffered jury instruction peremptorily told the jury that defendant had not received a pardon, a relief from a disability or a certificate of rehabilitation, thereby resulting in plain error by relieving the jury from finding each element of the offense; however, the absence of a

pardon, relief from a disability, or a certificate of rehabilitation were not essential elements of the crime of possession of a firearm by a convicted felon. Whether defendant received a pardon for the felony, or received a certificate of rehabilitation pursuant to Miss. Code Ann. § 97-37-5(c) was an affirmative defense that was incumbent upon defendant to raise. *Hicks v. State*, 973 So. 2d 211 (Miss. 2007).

5.5. Insufficient evidence.

Defendant's conviction for possession of a dirk knife by a convicted felon in violation of Miss. Code Ann. § 97-37-5 (Supp. 2009) was overturned as evidence failed to show that he was in possession of a dirk knife. A dirk knife had to have a blade with one sharpened edge that tapered to a point and had to be designed for use primarily as a stabbing weapon. *Summerall v. State*, 41 So. 3d 729 (Miss. Ct. App. 2010).

6. Sufficient evidence.

Defendant's conviction for being a felon in possession of a firearm was supported by the evidence because the jury was presented with testimony and evidence that defendant attempted to feloniously take money from victims against their will by putting them in fear of immediate injury by the exhibition of a deadly weapon, i.e., a gun; defendant admitted to being a prior-convicted felon. *Tugle v. State*, 68 So. 3d 691 (Miss. Ct. App. 2010), writ of certiorari denied by 69 So. 3d 767, 2011 Miss. LEXIS 416 (Miss. 2011).

Circuit court properly denied defendant's motion for a new trial based on defendant's argument that the guilty verdicts were based on insufficient evidence and/or were contrary to law or the weight of the evidence because: (1) allowing the conviction for convicted-felon-in-possession-of-firearm charge in violation of Miss. Code Ann. § 97-37-5(1) (Rev. 2006) to stand would not have been prejudicial to defendant since all of the evidence pointed to defendant, a prior convicted felon, being in possession of a firearm while not under duress, a conclusion that could have been reached by any rational juror; and (2) since there was conflicting testimony in the case, reasonable and fairminded jurors in the exercise of impartial judgment

could have reached different conclusions as to the verdict, thus resulting in the appellate court's finding that there was legally sufficient evidence to convict defendant of motor-vehicle theft Miss. Code Ann. § 97-17-42(1) (Rev. 2006). *Davis v. State*, 18 So. 3d 842 (Miss. 2009).

Where defendant disarmed his victim and fired the gun in the victim's direction and into a crowded nightclub, killing the victim and another and wounding three others, the trial court did not err in denying defendant's motion for a judgment notwithstanding the verdict because the evidence was sufficient to support defendant's convictions of murder, aggravated assault, and felon in possession of a firearm. *Roberson v. State*, 19 So. 3d 95 (Miss. Ct. App. 2009).

Defendant's conviction for possession of a firearm by a convicted felon in violation of Miss. Code Ann. § 97-37-5(1) was appropriate because defendant had been previously convicted of a felony and two witnesses testified that defendant was in possession of no less than three pistols. It was for the jury to decide whether to believe or disbelieve the testimony of those two witnesses. *Vickers v. State*, 994 So. 2d 200 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 675 (Miss. 2008).

Evidence was sufficient to show defendant was a felon in possession of a firearm when witnesses testified that they saw defendant retrieve a rifle and load the rifle; thereafter, the witnesses said defendant followed someone outside and gunshots were heard. Moreover, a records clerk testified that she had been subpoenaed to produce certain court documents, which showed, among other things, social security numbers and that defendant had been convicted of a felony. *Hicks v. State*, 973 So. 2d 211 (Miss. 2007).

There was sufficient additional incriminating evidence for a reasonable juror to find beyond a reasonable doubt that defendant was in constructive possession of the handgun found in his bedroom. *Williams v. State*, 971 So. 2d 581 (Miss. 2007).

Evidence was sufficient to convict defendant of being a felon in possession of a firearm where defendant's prior felony conviction was not at issue and witnesses

testified that defendant was seen shooting a firearm into the ground; witness credibility was for the jury to decide. *Edwards v. State*, 966 So. 2d 837 (Miss. Ct. App. 2007).

Evidence was sufficient to support defendant's conviction for possession of a firearm by a felon when witnesses testified that defendant pointed a gun, a witness testified defendant fired shots, a 911 dispatcher heard someone say, "put the gun down," and police found guns inside a trailer where defendant had been; the jury was the arbiter of conflicting evidence when two witnesses recanted their original statements. *Townsend v. State*, 939 So. 2d 796 (Miss. 2006).

There was sufficient evidence to sustain a conviction for possession of a firearm by a felon under Miss. Code Ann. § 97-37-5(1) based on the fact that defendant was found with a gun in his waistband; it was irrelevant that he was not seen shooting the gun, and the jury could have disbelieved his self-defense claim or found that he retained the weapon for a significant period after the danger had passed. *Hatten v. State*, 938 So. 2d 365 (Miss. Ct. App. 2006).

7. "Convicted felon."

Where an inmate argued that counsel was ineffective in allowing the inmate to

plead guilty to being a felon in possession of a deadly weapon when the prior conviction was based upon a California nolo contendere plea to a marijuana possession charge, which the inmate argued could not be used against the inmate in the Mississippi charges, the inmate failed to establish a prima facie case of ineffective assistance of counsel because, inter alia, the inmate admitted on the record that he had been convicted of a felony. *Knight v. State*, 983 So. 2d 348 (Miss. Ct. App. 2008), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 267 (Miss. 2008), writ of certiorari denied by 555 U.S. 998, 129 S. Ct. 492, 172 L. Ed. 2d 363, 2008 U.S. LEXIS 8079, 77 U.S.L.W. 3265 (2008).

8. Directed verdict.

Where a witness testified that defendant had a shotgun underneath his car seat, he was convicted of possession of a firearm by a convicted felon under Miss. Code Ann. § 97-37-5(1); the trial court did not err by denying defendant's motion for a directed verdict, because he presented no evidence to show that the shotgun was inoperable. By his own admission, the shotgun worked; furthermore, Miss. Code Ann. § 97-37-5(1) did not require the State to prove that the weapon was operable. *Cooley v. State*, 14 So. 3d 63 (Miss. Ct. App. 2008).

ATTORNEY GENERAL OPINIONS

The name of one convicted of the crime of receiving stolen property must be removed from the voter rolls. *Dill*, Apr. 1, 2005, A.G. Op. 05-0145.

Issuance of a certificate of rehabilitation pursuant to Section 97-37-5 only restores the right to possess a weapon and does not remove a conviction and does not allow a convicted felon to be qualified as a candi-

date for public office. *Ramsey*, Apr. 1, 2005, A.G. Op. 05-0143.

If the original owner of weapons in the possession of the sheriff is classified as a convicted felon, the weapons should be disposed of according to established legal methods. *Welford*, Aug. 12, 2005, A.G. Op. 05-0354.

§ 97-37-7. Deadly weapons; persons permitted to carry weapons; bond; permit to carry weapon; grounds for denying application for permit; required weapons training course; reciprocal agreements.

(1)(a) It shall not be a violation of Section 97-37-1 or any other statute for pistols, firearms or other suitable and appropriate weapons to be carried by duly constituted bank guards, company guards, watchmen, railroad special

agents or duly authorized representatives who are not sworn law enforcement officers, agents or employees of a patrol service, guard service, or a company engaged in the business of transporting money, securities or other valuables, while actually engaged in the performance of their duties as such, provided that such persons have made a written application and paid a nonrefundable permit fee of One Hundred Dollars (\$100.00) to the Department of Public Safety.

(b) No permit shall be issued to any person who has ever been convicted of a felony under the laws of this or any other state or of the United States. To determine an applicant's eligibility for a permit, the person shall be fingerprinted. If no disqualifying record is identified at the state level, the fingerprints shall be forwarded by the Department of Public Safety to the Federal Bureau of Investigation for a national criminal history record check. The department shall charge a fee which includes the amounts required by the Federal Bureau of Investigation and the department for the national and state criminal history record checks and any necessary costs incurred by the department for the handling and administration of the criminal history background checks. In the event a legible set of fingerprints, as determined by the Department of Public Safety and the Federal Bureau of Investigation, cannot be obtained after a minimum of three (3) attempts, the Department of Public Safety shall determine eligibility based upon a name check by the Mississippi Highway Safety Patrol and a Federal Bureau of Investigation name check conducted by the Mississippi Highway Safety Patrol at the request of the Department of Public Safety.

(c) A person may obtain a duplicate of a lost or destroyed permit upon payment of a Fifteen Dollar (\$15.00) replacement fee to the Department of Public Safety, if he furnishes a notarized statement to the department that the permit has been lost or destroyed.

(d)(i) No less than ninety (90) days prior to the expiration date of a permit, the Department of Public Safety shall mail to the permit holder written notice of expiration together with the renewal form prescribed by the department. The permit holder shall renew the permit on or before the expiration date by filing with the department the renewal form, a notarized affidavit stating that the permit holder remains qualified, and the renewal fee of Fifty Dollars (\$50.00); provided, however, that honorably retired law enforcement officers shall be exempt from payment of the renewal fee. A permit holder who fails to file a renewal application on or before its expiration date shall pay a late fee of Fifteen Dollars (\$15.00).

(ii) Renewal of the permit shall be required every four (4) years. The permit of a qualified renewal applicant shall be renewed upon receipt of the completed renewal application and appropriate payment of fees.

(iii) A permit cannot be renewed six (6) months or more after its expiration date, and such permit shall be deemed to be permanently expired; the holder may reapply for an original permit as provided in this section.

(2) It shall not be a violation of this or any other statute for pistols, firearms or other suitable and appropriate weapons to be carried by Depart-

ment of Wildlife, Fisheries and Parks law enforcement officers, railroad special agents who are sworn law enforcement officers, investigators employed by the Attorney General, criminal investigators employed by the district attorneys, all prosecutors, public defenders, investigators or probation officers employed by the Department of Corrections, employees of the State Auditor who are authorized by the State Auditor to perform investigative functions, or any deputy fire marshal or investigator employed by the State Fire Marshal, while engaged in the performance of their duties as such, or by fraud investigators with the Department of Human Services, or by judges of the Mississippi Supreme Court, Court of Appeals, circuit, chancery, county, justice and municipal courts, or by coroners. Before any person shall be authorized under this subsection to carry a weapon, he shall complete a weapons training course approved by the Board of Law Enforcement Officer Standards and Training. Before any criminal investigator employed by a district attorney shall be authorized under this section to carry a pistol, firearm or other weapon, he shall have complied with Section 45-6-11 or any training program required for employment as an agent of the Federal Bureau of Investigation. A law enforcement officer, as defined in Section 45-6-3, shall be authorized to carry weapons in courthouses in performance of his official duties. A person licensed under Section 45-9-101 to carry a concealed pistol, who has voluntarily completed an instructional course in the safe handling and use of firearms offered by an instructor certified by a nationally recognized organization that customarily offers firearms training, or by any other organization approved by the Department of Public Safety, shall also be authorized to carry weapons in courthouses except in courtrooms during a judicial proceeding, and any location listed in subsection (13) of Section 45-9-101, except any place of nuisance as defined in Section 95-3-1, any police, sheriff or highway patrol station or any detention facility, prison or jail. The department shall promulgate rules and regulations allowing concealed pistol permit holders to obtain an endorsement on their permit indicating that they have completed the aforementioned course and have the authority to carry in these locations. This section shall in no way interfere with the right of a trial judge to restrict the carrying of firearms in the courtroom.

(3) It shall not be a violation of this or any other statute for pistols, firearms or other suitable and appropriate weapons, to be carried by any out-of-state, full-time commissioned law enforcement officer who holds a valid commission card from the appropriate out-of-state law enforcement agency and a photo identification. The provisions of this subsection shall only apply if the state where the out-of-state officer is employed has entered into a reciprocity agreement with the state that allows full-time commissioned law enforcement officers in Mississippi to lawfully carry or possess a weapon in such other states. The Commissioner of Public Safety is authorized to enter into reciprocal agreements with other states to carry out the provisions of this subsection.

SOURCES: Codes, 1880, § 2985; 1892, § 1026; 1906, § 1103; Hemingway's 1917, § 829; 1930, § 853; 1942, § 2079; Laws, 1898, p. 86; Laws, 1960, ch. 242, § 1; Laws, 1962, ch. 310, § 1; Laws, 1973, ch. 437, § 1; Laws, 1974, ch. 323 § 1; Laws, 1981, ch. 415, § 1; Laws, 1986, ch. 372; Laws, 1990, ch. 483, § 1; Laws, 1991, ch. 609, § 5; Laws, 1995, ch. 534, § 1; Laws, 1998, ch. 472, § 1; Laws, 2000, ch. 439, § 1; Laws, 2001, ch. 566, § 2; Laws, 2002, ch. 577, § 1; Laws, 2008, ch. 319, § 6; Laws, 2011, ch. 338, § 1; Laws, 2011, ch. 535, § 1, eff from and after July 1, 2011.

Editor's Note — Laws of 2008, ch. 319, § 1, provides:

“SECTION 1. This act shall be known as the ‘Justice Court Reform Act of 2008.’”

On July 24 2008, the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, as amended and extended, to the amendment of this section by Laws of 2008, ch. 319, § 6.

Laws of 2011, ch. 535, § 3, provides:

“SECTION 3. It is the intent of the Legislature that the amendments contained in Section 1 of this act shall be integrated with the amendments to Section 97-37-7, Mississippi Code of 1972, contained in House Bill No. 506 [ch. 338], 2011 Regular Session, without regard to the effective dates of passage of those acts.”

Amendment Notes — The 2008 amendment in the second version, inserted “justice” near the end of the first sentence of (2).

The first 2011 amendment (ch. 338) inserted “Highway” preceding “Safety Patrol at the request of the Department of Public Safety” at the end of (1)(b); in (2), deleted “district attorneys, legal assistants to district attorneys” preceding “criminal investigators employed by the district attorneys”, and inserted “all prosecutors, public defenders” thereafter in the first sentence and added the fifth and sixth sentences.

The second 2011 amendment (ch. 535) in (1)(b), inserted “Highway” following “conducted by the Mississippi” near the end; in (2), deleted “district attorneys, legal assistants to district attorneys” preceding “criminal investigators employed by the district attorneys” and inserted “all prosecutors, public defenders” thereafter, added “or by coroners” to the end of the first sentence, and added the fifth and sixth sentences.

§ 97-37-11. Repealed.

Repealed by Laws of 2012, ch. 384, § 1, effective from and after passage (approved April 18, 2012).

§ 97-37-11. [Codes, 1906, § 1106; Hemingway's 1917, § 832; 1930, § 856; 1942, § 2082; Laws, 2002, ch. 429, § 1, eff from and after July 1, 2002.]

Editor's Note — Former § 97-37-11 required dealers to keep records of weapons sold.

§ 97-37-17. Possession of weapons by students; aiding or encouraging.

(1) The following definitions apply to this section:

(a) “Educational property” shall mean any public or private school building or bus, public or private school campus, grounds, recreational area, athletic field, or other property owned, used or operated by any local school board, school, college or university board of trustees, or directors for the administration of any public or private educational institution or during a school-related activity, and shall include the facility and property of the Oakley Youth Development Center, operated by the Department of Human

Services; provided, however, that the term “educational property” shall not include any sixteenth section school land or lieu land on which is not located a school building, school campus, recreational area or athletic field.

(b) “Student” shall mean a person enrolled in a public or private school, college or university, or a person who has been suspended or expelled within the last five (5) years from a public or private school, college or university, or a person in the custody of the Oakley Youth Development Center, operated by the Department of Human Services, whether the person is an adult or a minor.

(c) “Switchblade knife” shall mean a knife containing a blade or blades which open automatically by the release of a spring or a similar contrivance.

(d) “Weapon” shall mean any device enumerated in subsection (2) or (4) of this section.

(2) It shall be a felony for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol or other firearm of any kind, or any dynamite cartridge, bomb, grenade, mine or powerful explosive on educational property. However, this subsection does not apply to a BB gun, air rifle or air pistol. Any person violating this subsection shall be guilty of a felony and, upon conviction thereof, shall be fined not more than Five Thousand Dollars (\$5,000.00), or committed to the custody of the State Department of Corrections for not more than three (3) years, or both.

(3) It shall be a felony for any person to cause, encourage or aid a minor who is less than eighteen (18) years old to possess or carry, whether openly or concealed, any gun, rifle, pistol or other firearm of any kind, or any dynamite cartridge, bomb, grenade, mine or powerful explosive on educational property. However, this subsection does not apply to a BB gun, air rifle or air pistol. Any person violating this subsection shall be guilty of a felony and, upon conviction thereof, shall be fined not more than Five Thousand Dollars (\$5,000.00), or committed to the custody of the State Department of Corrections for not more than three (3) years, or both.

(4) It shall be a misdemeanor for any person to possess or carry, whether openly or concealed, any BB gun, air rifle, air pistol, bowie knife, dirk, dagger, slingshot, leaded cane, switchblade knife, blackjack, metallic knuckles, razors and razor blades (except solely for personal shaving), and any sharp-pointed or edged instrument except instructional supplies, unaltered nail files and clips and tools used solely for preparation of food, instruction and maintenance on educational property. Any person violating this subsection shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than One Thousand Dollars (\$1,000.00), or be imprisoned not exceeding six (6) months, or both.

(5) It shall be a misdemeanor for any person to cause, encourage or aid a minor who is less than eighteen (18) years old to possess or carry, whether openly or concealed, any BB gun, air rifle, air pistol, bowie knife, dirk, dagger, slingshot, leaded cane, switchblade, knife, blackjack, metallic knuckles, razors and razor blades (except solely for personal shaving) and any sharp-pointed or edged instrument except instructional supplies, unaltered nail files and clips

and tools used solely for preparation of food, instruction and maintenance on educational property. Any person violating this subsection shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than One Thousand Dollars (\$1,000.00), or be imprisoned not exceeding six (6) months, or both.

(6) It shall not be a violation of this section for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol or other firearm of any kind on educational property if:

(a) The person is not a student attending school on any educational property;

(b) The firearm is within a motor vehicle; and

(c) The person does not brandish, exhibit or display the firearm in any careless, angry or threatening manner.

(7) This section shall not apply to:

(a) A weapon used solely for educational or school-sanctioned ceremonial purposes, or used in a school-approved program conducted under the supervision of an adult whose supervision has been approved by the school authority;

(b) Armed Forces personnel of the United States, officers and soldiers of the militia and National Guard, law enforcement personnel, any private police employed by an educational institution, State Militia or Emergency Management Corps and any guard or patrolman in a state or municipal institution, and any law enforcement personnel or guard at a state juvenile training school, when acting in the discharge of their official duties;

(c) Home schools as defined in the compulsory school attendance law, Section 37-13-91;

(d) Competitors while participating in organized shooting events;

(e) Any person as authorized in Section 97-37-7 while in the performance of his official duties;

(f) Any mail carrier while in the performance of his official duties; or

(g) Any weapon not prescribed by Section 97-37-1 which is in a motor vehicle under the control of a parent, guardian or custodian, as defined in Section 43-21-105, which is used to bring or pick up a student at a school building, school property or school function.

(8) All schools shall post in public view a copy of the provisions of this section.

SOURCES: Codes, 1880, § 2988; 1892, § 1030; 1906, § 1109; Hemingway's 1917, § 835; 1930, § 859; 1942, § 2085; Laws, 1994, ch. 607, § 1; Laws, 1995, ch. 607, § 1; Laws, 2008, ch. 459, § 2; Laws, 2010, ch. 554, § 12, eff from and after July 1, 2011.

Amendment Notes — The 2008 amendment inserted “and shall include...operated by the Department of Human Services” in (1)(a); inserted “or a person in the custody...Department of Human Services” in (1)(b); inserted “and any law enforcement personnel or guard at a state juvenile training school” at the end of (7)(b); and made a minor stylistic change.

The 2010 amendment, in the second version, effective from and after July 1, 2011, substituted “and shall include the facility and property of the Oakley Youth Development Center” for “and shall include the facilities and property of the Oakley and Columbia juvenile training schools” in (1)(a); and substituted “in the custody of the Oakley Youth Development Center” for “in the custody of the Oakley or Columbia juvenile training schools” in (1)(b).

§ 97-37-27. Fireworks; unlawful to explode in certain places.

ATTORNEY GENERAL OPINIONS

A county board of supervisors has the authority to enact regulations allowing the explosion of fireworks in “unincorporated towns and villages” which are not

within three hundred yards of a railroad depot, cotton or hay warehouse or cotton yard. Morrow, Jan. 13, 2006, A.G. Op. 05-0640.

§ 97-37-29. Shooting into dwelling house.

JUDICIAL DECISIONS

1. In general.
3. Evidence.
4. Double Jeopardy.

1. In general.

Miss. Code Ann. § 97-37-29 should be classified as a general intent crime since the term “willfully,” without more, indicates the person intended to do the unlawful bodily movements: that is, to shoot the firearm; there is no further language in the statute for an intent to do a further act or achieve another consequence, as there would be in a specific intent crime. *Johnson v. State*, 44 So. 3d 400 (Miss. Ct. App. 2010).

Trial court did not abuse its discretion by admitting defendant's prior conviction of shooting into an occupied dwelling into evidence under Miss. R. Evid. 609 because he opened the door to the state's questions concerning the conviction, as he testified that he did not get angry with his loved ones and that he, at best, simply walked away if he started getting angry; the prior conviction involved defendant's shooting into his ex-girlfriend's house. *White v. State*, 962 So. 2d 728 (Miss. Ct. App. 2007).

Defendant's convictions for murder, armed robbery, and shooting into an occupied dwelling were appropriate because the evidence was sufficient: two witnesses testified to seeing defendant shoot the

victim; a witness further testified to observing defendant removing the victim's clothing and wallet; and a female testified to a shot being fired through her front door at approximately the time that the victim was shot. *Conner v. State*, 971 So. 2d 630 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2007 Miss. LEXIS 682 (Miss. 2007).

Where defendant admitted to firing a shot while near or at a victim's front door, witnesses saw him at the scene, he threatened to shoot everyone inside the residence, and there were no bullet holes there earlier in the day, there was sufficient evidence to support a conviction under Miss. Code Ann. § 97-37-29; therefore, a trial court did not err by refusing to grant a peremptory instruction or by denying defendant's motions for a directed verdict and judgment notwithstanding the verdict and/or a new trial. *Miles v. State*, 956 So. 2d 349 (Miss. Ct. App. 2007).

Defendant's convictions for aggravated assault and shooting into an occupied dwelling were not against the overwhelming weight of the evidence because: (1) the victim and a witness testified that they told police right away that defendant was the shooter; (2) the victim's mother testified that one week before the shooting the victim's sister and defendant's ex-girl-

friend called home scared because defendant had threatened to shoot up the house or to set it on fire; (3) the victim's mother testified that it was that same week she spotted defendant trying to break into the home; and (4) defendant's brother-in-law testified that defendant admitted that he shot the victim. *Brown v. State*, 986 So. 2d 308 (Miss. Ct. App. 2006), reversed by remanded by 986 So. 2d 270, 2008 Miss. LEXIS 340 (Miss. 2008).

3. Evidence.

Defendant's conviction for shooting into a dwelling house was appropriate because the testimony showed that defendant willfully and unlawfully fired the weapon in the direction of the trailer and struck it. The proof also showed that defendant was aiming at the victim, who was standing in front of the trailer. *Johnson v. State*, 44 So. 3d 400 (Miss. Ct. App. 2010).

Defendant's conviction for shooting into a dwelling house was appropriate because the appellate court rejected defendant's contention that "willfully" in Miss. Code Ann. § 97-37-29 must be interpreted to mean that he had to have the specific intent to shoot into the trailer. Defendant was presumed to have known that when he attempted to shoot the victim while the fight ensued in front of the trailer, a natural probable result of this illegal act was

the possibility of shooting into the trailer. *Johnson v. State*, 44 So. 3d 400 (Miss. Ct. App. 2010).

Although defendant, who was convicted of murder while engaged in the crime of drive-by shooting and for shooting into an occupied dwelling, argued that the State failed to prove that he willfully discharged a pistol into a dwelling, the evidence amply supported the jury's finding that defendant willfully shot into an occupied dwelling. Two witnesses testified that defendant expressed his intent to shoot at the victim's house and that he admitted shooting the victim, and the victim's girlfriend identified defendant's voice during an altercation that took place outside the victim's home immediately prior to the shooting. *Boyd v. State*, 977 So. 2d 329 (Miss. 2008).

4. Double Jeopardy.

Defendant's convictions for murder and for shooting into an occupied dwelling did not violate the double jeopardy clause of the Fifth Amendment. In order to convict defendant for shooting into an occupied dwelling, the State was required to prove that defendant shot into a dwelling house, but no such showing was required to convict defendant under the felony-murder statute. *Boyd v. State*, 977 So. 2d 329 (Miss. 2008).

§ 97-37-30. Willful discharge of a firearm toward the dwelling of another causing damage to property or domesticated animal or livestock.

A person who willfully discharges his firearm toward the dwelling of another, causing property damage to the dwelling or any domesticated animal or livestock, is guilty of a misdemeanor punishable by a fine of not more than One Thousand Dollars (\$1,000.00) or imprisonment not exceeding twelve (12) months in the county jail, or both.

SOURCES: Laws, 2010, ch. 523, § 1, eff from and after July 1, 2010.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-37-35. Stolen firearms; possession, receipt, acquisition or disposal; offense; punishment.

JUDICIAL DECISIONS

- 1.-2. [Reserved for future use].
3. Evidence.
4. Overwhelming weight of evidence.
5. Sentence.

1.-2. [Reserved for future use].

Defendant's argument that the State failed to prove that he knew the firearm he used in the shootings was stolen and thus, that his conviction for possession of a stolen firearm was improper, was without merit, Miss. Code Ann. § 97-37-35(1). The jury heard the informant testify that he gave defendant a pistol in exchange for crack cocaine and the informant testified that defendant knew the pistol was stolen and that defendant was trying to sell it quickly because it was a stolen gun. *Mayers v. State*, 42 So. 3d 33 (Miss. Ct. App. 2010), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

3. Evidence.

To convict a defendant of trafficking in stolen firearms, the State did not need to enter the actual firearms into evidence as (1) there was no best evidence rule with regard to physical evidence that was not writings, recordings, or photographs; (2) requiring the State to offer actual firearms into evidence would impose a high burden on prosecutors and the courts in cases where there were large quantities of physical evidence; and (3) the State satisfied the relevancy and authentication requirements permitting the photographs of the firearms to be introduced into evidence. *Riley v. State*, 1 So. 3d 877 (Miss.

Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 18 (Miss. 2009).

4. Overwhelming weight of evidence.

Guilty verdict was not against the overwhelming weight of the evidence because (1) the testimony of defendant's accomplice was reasonable, consistent, and substantially uncontradicted; (2) the jury received a cautionary instruction relating to the manner in which the accomplice testimony should be viewed; (3) the accomplice's testimony that defendant knew the firearms were stolen was corroborated because defendant told the investigators that he had nothing to do with the burglaries and only pointed out places where guns were sold; and (4) one of the buyers testified that defendant sold the guns to him. *Riley v. State*, 1 So. 3d 877 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 18 (Miss. 2009).

5. Sentence.

Defendant's 30-year sentence for each count of trafficking in stolen firearms was not unconstitutionally disproportionate to the crime committed because (1) it was within the statutory guidelines, which the legislature created as a matter of public policy; (2) it was below the potential life sentence he could have received; and (3) it was not grossly disproportionate to the crime he committed. *Riley v. State*, 1 So. 3d 877 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 18 (Miss. 2009).

§ 97-37-37. Enhanced penalty for use of firearm during commission of felony.

(1) Except to the extent that a greater minimum sentence is otherwise provided by any other provision of law, any person who uses or displays a firearm during the commission of any felony shall, in addition to the punishment provided for such felony, be sentenced to an additional term of imprisonment in the custody of the Department of Corrections of five (5) years, which sentence shall not be reduced or suspended.

(2) Except to the extent that a greater minimum sentence is otherwise provided by any other provision of law, any convicted felon who uses or displays a firearm during the commission of any felony shall, in addition to the punishment provided for such felony, be sentenced to an additional term of imprisonment in the custody of the Department of Corrections of ten (10) years, to run consecutively, not concurrently, which sentence shall not be reduced or suspended.

SOURCES: Laws, 2004, ch. 392, § 1; Laws, 2007, ch. 323, § 1, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment added (2); and designated the former first paragraph as (1).

JUDICIAL DECISIONS

1. Applicability.
2. Double jeopardy.

So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

1. Applicability.

Defendant's enhanced sentences for his convictions of aggravated assault on law enforcement officers were inappropriate because he should have been sentenced under Miss. Code Ann. § 97-37-37(1), which became effective on July 1, 2004 and which was in effect at the time his crime was committed. Instead, he was incorrectly sentenced under Miss. Code Ann. § 97-37-37(2), which was not in effect at the time his crime was committed. *Mayers v. State*, 42 So. 3d 33 (Miss. Ct. App. 2010), writ of certiorari denied by 42

2. Double jeopardy.

Defendant's argument that the application of Miss. Code Ann. § 97-37-37 constituted double jeopardy because it required proof of the same elements as the underlying crimes was procedurally barred because it was not raised at trial. Notwithstanding the procedural bar, the argument was without merit because the statute was clearly a sentence enhancement and did not set out separate elements of the underlying felony. *Mayers v. State*, 42 So. 3d 33 (Miss. Ct. App. 2010), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

HONESTY IN PURCHASING FIREARMS ACT

SEC.

97-37-101. Short title.

97-37-103. Definition.

97-37-105. Crime of soliciting, persuading, encouraging or enticing illegal sale of firearms or ammunition; crime of providing false information to licensed dealer or private seller of firearms or ammunition.

§ 97-37-101. Short title.

Sections 97-37-101 through 97-37-105 shall be known and may be cited as the "Honesty in Purchasing Firearms Act."

SOURCES: Laws, 2012, ch. 494, § 1, eff from and after July 1, 2012.

§ 97-37-103. Definition.

(1) For purposes of Sections 97-37-101 through 97-37-105.

(a) “Licensed dealer” means a person who is licensed pursuant to 18 USCS, Section 923, to engage in the business of dealing in firearms.

(b) “Private seller” means a person who sells or offers for sale any firearm or ammunition.

(c) “Ammunition” means any cartridge, shell or projectile designed for use in a firearm.

(d) “Materially false information” means information that portrays an illegal transaction as legal or a legal transaction as illegal.

SOURCES: Laws, 2012, ch. 494, § 2, eff from and after July 1, 2012.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in the introductory paragraph by substituting “Sections 97-37-101 through 97-37-105” for “this section.” The Joint Committee ratified the correction at its August 16, 2012, meeting.

Editor’s Note — This section was enacted with a subsection (1) but no subsection (2) by Section 2 of Chapter 494, Laws of 2012.

§ 97-37-105. Crime of soliciting, persuading, encouraging or enticing illegal sale of firearms or ammunition; crime of providing false information to licensed dealer or private seller of firearms or ammunition.

(1) Any person who knowingly solicits, persuades, encourages or entices a licensed dealer or private seller of firearms or ammunition to transfer a firearm or ammunition under circumstances which the person knows would violate the laws of this state or the United States is guilty of a felony.

(2) Any person who knowingly solicits, persuades, encourages or entices a licensed dealer or private seller of firearms or ammunition to transfer a firearm or ammunition under circumstances which the person knows would violate the laws of this state or the United States is guilty of a felony.

(3) Any person found guilty of violating the provisions of this section shall be punished by a fine not exceeding Five Thousand Dollars (\$5,000.00) or imprisoned in the custody of the Department of Corrections for not more than three (3) years, or both.

(4) This section does not apply to a law enforcement officer acting in the officer’s official capacity or to a person acting at the direction of a law enforcement officer.

SOURCES: Laws, 2012, ch. 494, § 3, eff from and after July 1, 2012.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

CHAPTER 41

Cruelty to Animals

SEC.

- 97-41-1. Living creatures not to be cruelly treated.
- 97-41-3. Authority to kill injured, neglected, etc. animals other than dogs or cats; authorization to euthanize injured, diseased, etc. dog or cat under certain circumstances; immunity of persons acting in good faith and without malice pursuant to section.
- 97-41-5. Carrying creature other than dog or cat in a cruel manner.
- 97-41-7. Confining creatures other than dogs or cats without food or water.
- 97-41-9. Failure of owner or custodian to provide sustenance to creatures other than dogs or cats.
- 97-41-16. Mississippi Dog and Cat Pet Protection Law of 2011; legislative intent; simple cruelty; aggravated cruelty; penalty; restitution; activities not constituting cruelty to dog or cat; immunity for good faith reporting of suspected cruelty; registration of organizations that have purpose of protection of or prevention of cruelty to dogs and cats.
- 97-41-17. Poisons; administering to animals.
- 97-41-18. Prohibition against intentionally conducting fight between canine and hog; exceptions; penalties.
- 97-41-21. Harassment of guide, leader, hearing, service or support dogs; penalties.
- 97-41-23. Injury and killing of public service animals; penalties.

§ 97-41-1. Living creatures not to be cruelly treated.

Except as otherwise provided in Section 97-41-16 for a dog or cat, if any person shall intentionally or with criminal negligence override, overdrive, overload, torture, torment, unjustifiably injure, deprive of necessary sustenance, food, or drink; or cruelly beat or needlessly mutilate; or cause or procure to be overridden, overdriven, overloaded, tortured, unjustifiably injured, tormented, or deprived of necessary sustenance, food or drink; or to be cruelly beaten or needlessly mutilated or killed, any living creature, every such offender shall, for every offense, be guilty of a misdemeanor.

SOURCES: Codes, 1880, § 804; 1892, § 1014; 1906, § 1091; Hemingway's 1917, § 817; 1930, § 841; 1942, § 2067; Laws, 2011, ch. 536, § 2, eff from and after passage (approved Apr. 26, 2011.)

Amendment Notes — The 2011 amendment added “Except as otherwise provided in Section 97-41-16 for a dog or cat” preceding “if any person shall” and “intentionally or with criminal negligence” near the beginning of the section.

§ 97-41-3. Authority to kill injured, neglected, etc. animals other than dogs or cats; authorization to euthanize injured, diseased, etc. dog or cat under certain circumstances; immunity of persons acting in good faith and without malice pursuant to section.

(1) Any sheriff, constable, policeman, or agent of a society for the prevention of cruelty to animals may kill, or cause to be killed, any animal

other than a dog or cat found neglected or abandoned, if in the opinion of three (3) respectable citizens it is injured or diseased past recovery, or by age has become useless.

(2)(a) After all reasonable attempts have been made to locate the legal owner of a dog or cat that is found maimed, wounded, injured or diseased, the dog or cat may be euthanized, or caused to be euthanized, by:

(i) A law enforcement officer;

(ii) A veterinarian licensed in Mississippi;

(iii) An employee of an agency or department of a political subdivision that is charged with the control or welfare of dogs or cats within the subdivision; or

(iv) An employee or agent of an organization that has the purpose of protecting the welfare of or preventing cruelty to dogs or cats and that possesses nonprofit status under the United States Internal Revenue Code.

(b) The provisions of this subsection (2) shall not be construed to prevent the immediate euthanasia by the persons enumerated in this subsection or by any other person, if it is necessary to prevent unrelievable suffering of the dog or cat.

(3) Any person acting in good faith and without malice pursuant to this section shall be immune from civil and criminal liability for that action.

SOURCES: Codes, 1892, § 1015; 1906, § 1092; Hemingway's 1917, § 818; 1930, § 842; 1942, § 2068; Laws, 2011, ch. 536, § 3, eff from and after passage (approved Apr. 26, 2011.)

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in this section. The word “be” preceding “injured or diseased” was changed to “is.” The Joint Committee ratified the correction at its August 5, 2008, meeting.

Amendment Notes — The 2011 amendment inserted the subsection (1) designation and “other than a dog or cat”; added (2) and (3).

§ 97-41-5. Carrying creature other than dog or cat in a cruel manner.

If any person shall carry, or cause to be carried by hand or in or upon any vehicle or other conveyance, any creature other than a dog or cat in a cruel or inhuman manner, he shall be guilty of a misdemeanor.

SOURCES: Codes, 1880, § 808; 1892, § 1018; 1906, § 1095; Hemingway's 1917, § 821; 1930, § 845; 1942, § 2071; Laws, 2011, ch. 536, § 4, eff from and after passage (approved Apr. 26, 2011.)

Amendment Notes — The 2011 amendment inserted “other than a dog or cat” preceding “in a cruel or inhuman manner.”

§ 97-41-7. Confining creatures other than dogs or cats without food or water.

If any person shall confine, or cause to be confined, in any stable, lot, or other place, any living creature other than a dog or cat, without supplying the same during such confinement with a sufficient quantity of good and wholesome food and water, he shall be guilty of a misdemeanor.

SOURCES: Codes, 1880, § 806; 1892, § 1017; 1906, § 1094; Hemingway's 1917, § 820; 1930, § 844; 1942, § 2070; Laws, 2011, ch. 536, § 5, eff from and after passage (approved Apr. 26, 2011.)

Amendment Notes — The 2011 amendment inserted “other than a dog or cat” preceding “without supplying the same during such confinement.”

§ 97-41-9. Failure of owner or custodian to provide sustenance to creatures other than dogs or cats.

If any person be the owner or have the custody of any living creature other than a dog or cat and unjustifiably neglect or refuse to furnish it necessary sustenance, food, or drink, he shall be guilty of a misdemeanor.

SOURCES: Codes, 1892, § 1015; 1906, § 1092; Hemingway's 1917, § 818; 1930, § 842; 1942, § 2068; Laws, 2011, ch. 536, § 6, eff from and after passage (approved Apr. 26, 2011.)

Amendment Notes — The 2011 amendment inserted “other than a dog or cat” preceding “and unjustifiably neglect or refuse to furnish.”

§ 97-41-15. Malicious or mischievous injury to livestock; penalty; restitution.

RESEARCH REFERENCES

ALR. Propriety, Measure, and Elements of Restitution to Which Victim is Entitled Under State Criminal Statute —	Cruelty to, Killing, or Abandonment of, Animals. 45 A.L.R.6th 435.
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§ 97-41-16. Mississippi Dog and Cat Pet Protection Law of 2011; legislative intent; simple cruelty; aggravated cruelty; penalty; restitution; activities not constituting cruelty to dog or cat; immunity for good faith reporting of suspected cruelty; registration of organizations that have purpose of protection of or prevention of cruelty to dogs and cats.

(1)(a) The provisions of this section shall be known and may be cited as the “Mississippi Dog and Cat Pet Protection Law of 2011.”

(b) The intent of the Legislature in enacting this law is to provide only for the protection of domesticated dogs and cats, as these are the animals

most often serving as the loyal and beloved pets of the citizens of this state. Animals other than domesticated dogs and cats are specifically excluded from the enhanced protection described in this section for dogs and cats. The provisions of this section do not apply, and shall not be construed as applying, to any animal other than a domesticated dog or cat.

(2)(a) If a person shall intentionally or with criminal negligence wound, deprive of adequate shelter, food or water, or carry or confine in a cruel manner, any domesticated dog or cat, or cause any person to do the same, then he or she shall be guilty of the offense of simple cruelty to a dog or cat. A person who is convicted of the offense of simple cruelty to a dog or cat shall be guilty of a misdemeanor and fined not more than One Thousand Dollars (\$1,000.00), or imprisoned not more than six (6) months, or both.

(b) If a person with malice shall intentionally torture, mutilate, maim, burn, starve or disfigure any domesticated dog or cat, or cause any person to do the same, then he or she shall be guilty of the offense of aggravated cruelty to a dog or cat.

(i) A person who is convicted of a first offense of aggravated cruelty to a dog or cat shall be guilty of a misdemeanor and fined not more than Two Thousand Five Hundred Dollars (\$2,500.00), or imprisoned for not more than six (6) months, or both.

(ii) A person who is convicted of a second or subsequent offense of aggravated cruelty to a dog or cat, the offenses being committed within a period of five (5) years, shall be guilty of a felony and fined not more than Five Thousand Dollars (\$5,000.00) and imprisoned for not less than one (1) year nor more than five (5) years.

(c) A conviction entered upon a plea of nolo contendere to a charge of aggravated cruelty to a dog or cat shall be counted as a conviction for the purpose of determining whether a later conviction is a first or subsequent offense.

(d) For purposes of this section, one or more alleged acts of the offenses of simple cruelty to a dog or cat or aggravated cruelty to a dog or cat, committed against one or more domesticated dogs or cats, or any combination thereof, shall constitute a single offense if the alleged acts occurred at the same time.

(3) In addition to such fine or imprisonment which may be imposed:

(a) The court shall order that restitution be made to the owner of such dog or cat. The measure for restitution in money shall be the current replacement value of such loss and the actual veterinarian fees, medicine, special supplies, loss of income and other costs incurred as a result of actions in violation of subsection (2) of this section; and

(b) The court may order that:

(i) The reasonable costs of sheltering, transporting and rehabilitating the dog or cat, and any other costs directly related to the care of the dog or cat, be reimbursed to:

1. Any law enforcement agency; or
2. Any agency or department of a political subdivision that is charged with the control, protection or welfare of dogs or cats within the

subdivision. The agency or department may reimburse a nongovernmental organization for such costs, if the organization possesses non-profit status under the United States Internal Revenue Code and has the purpose of protecting the welfare of, or preventing cruelty to, dogs or cats.

(ii) The person convicted:

1. Receive a psychiatric or psychological evaluation and counseling or treatment for a length of time as prescribed by the court. The cost of any evaluation, counseling and treatment shall be paid by the offender upon order of the court, up to a maximum amount that is no more than the jurisdictional limit of the sentencing court.

2. Perform community service for a period not exceeding the applicable maximum term of imprisonment that may be imposed for conviction of the offense.

3. Be enjoined from employment in any position that involves the care of a dog or cat, or in any place where dogs or cats are kept or confined, for a period which the court deems appropriate.

(4)(a) Nothing in this section shall be construed as prohibiting a person from:

(i) Defending himself or herself or another person from physical or economic injury being threatened or caused by a dog or cat.

(ii) Injuring or killing an unconfined dog or cat on the property of the person, if the unconfined dog or cat is believed to constitute a threat of physical injury or damage to any domesticated animal under the care or control of such person.

(iii) Acting under the provisions of Section 95-5-19 to protect poultry or livestock from a trespassing dog that is in the act of chasing or killing the poultry or livestock, or acting to protect poultry or livestock from a trespassing cat that is in the act of chasing or killing the poultry or livestock.

(iv) Engaging in practices that are licensed or lawful under the Mississippi Veterinary Practice Act, Section 73-39-51 et seq., or engaging in activities by any licensed veterinarian while following accepted standards of practice of the profession within the State of Mississippi, including the euthanizing of a dog or cat.

(v) Rendering emergency care, treatment, or assistance to a dog or cat that is abandoned, ill, injured, or in distress, if the person rendering the care, treatment, or assistance is acting in good faith.

(vi) Performing activities associated with accepted agricultural and animal husbandry practices with regard to livestock, poultry or other animals, including those activities which involve:

1. Using dogs in such practices.

2. Raising, managing and using animals to provide food, fiber or transportation.

3. Butchering animals and processing food.

(vii) Training for, or participating in, a rodeo, equine activity, dog show, event sponsored by a kennel club or other bona fide organization

that promotes the breeding or showing of dogs or cats, or any other competitive event which involves the lawful use of dogs or cats.

(viii) Engaging in accepted practices of dog or cat identification.

(ix) Engaging in lawful activities that are regulated by the Mississippi Department of Wildlife, Fisheries and Parks or the Mississippi Department of Marine Resources, including without limitation, hunting, trapping, fishing, and wildlife and seafood management.

(x) Performing scientific, research, medical and zoological activities undertaken by research and education facilities or institutions that are:

1. Regulated under the provisions of the Animal Welfare Act, 7 USCS 2131 et seq., as in effect on July 1, 2011;

2. Regulated under the provisions of the Health Research Extension Act of 1985, Public Law No. 99-158; or

3. Subject to any other applicable state or federal law or regulation governing animal research as in effect on July 1, 2011.

(xi) Disposing of or destroying certain dogs under authority of Sections 19-5-50, 21-19-9 and 41-53-11, which allow counties, municipalities and certain law enforcement officers to destroy dogs running at large without proper identification indicating that such dogs have been vaccinated for rabies.

(xii) Engaging in professional pest control activities, including those activities governed by the Mississippi Pesticide Law of 1975, Section 69-23-1 et seq.; professional services related to entomology, plant pathology, horticulture, tree surgery, weed control or soil classification, as regulated under Section 69-19-1 et seq.; and any other pest control activities conducted in accordance with state law.

(xiii) Performing the humane euthanization of a dog or cat pursuant to Section 97-41-3.

(b) If the owner or person in control of a dog or cat is precluded, by natural or other causes beyond his reasonable control, from acting to prevent an act or omission that might otherwise constitute an allegation of the offense of simple cruelty to a dog or cat or the offense of aggravated cruelty to a dog or cat, then that person shall not be guilty of the offense. Natural or other causes beyond the reasonable control of the person include, without limitation, acts of God, declarations of disaster, emergencies, acts of war, earthquakes, hurricanes, tornadoes, fires, floods or other natural disasters.

(5) The provisions of this section shall not be construed to:

(a) Apply to any animal other than a dog or cat.

(b) Create any civil or criminal liability on the part of the driver of a motor vehicle if the driver unintentionally injures or kills a dog or cat as a result of the dog or cat being accidentally hit by the vehicle.

(6)(a) Except as otherwise provided in Section 97-35-47 for the false reporting of a crime, a person, who in good faith and acting without malice, reports a suspected incident of simple cruelty to a dog or cat, or aggravated cruelty to a dog or cat, to a local animal control, protection or welfare organization, a local law enforcement agency, or the Mississippi Department

of Public Safety, shall be immune from civil and criminal liability for reporting the incident.

(b) A veterinarian licensed in Mississippi or a person acting at the direction of a veterinarian licensed in Mississippi, who in good faith and acting without malice, participates in the investigation of an alleged offense of simple or aggravated cruelty to a dog or cat, or makes a decision or renders services regarding the care of a dog or cat that is involved in the investigation, shall be immune from civil and criminal liability for those acts.

(7) Other than an agency or department of a political subdivision that is charged with the control, protection or welfare of dogs or cats within the subdivision, any organization that has the purpose of protecting the welfare of, or preventing cruelty to, dogs or cats, shall register the organization with the sheriff of the county in which the organization operates a physical facility for the protection, welfare or shelter of dogs or cats, on or before the first day of October each year. The provisions of this subsection (7) shall apply to any organization that has the purpose of protecting the welfare of dogs or cats, or preventing cruelty to dogs or cats, regardless of whether the organization also protects animals other than dogs or cats.

(8) Nothing in this section shall limit the authority of a municipality or board of supervisors to adopt ordinances, rules, regulations or resolutions which may be, in whole or in part, more restrictive than the provisions of this section, and in those cases, the more restrictive ordinances, rules, regulations or resolutions will govern.

SOURCES: Laws, 1993, ch. 438, § 3; Laws, 2006, ch. 491, § 1; Laws, 2011, ch. 536, § 1, eff from and after passage (approved Apr. 26, 2011.)

Amendment Notes — The 2011 amendment rewrote the section.

RESEARCH REFERENCES

ALR. Propriety, Measure, and Elements of Restitution to Which Victim is Entitled Under State Criminal Statute — Cruelty to, Killing, or Abandonment of Animals. 45 A.L.R.6th 435.

§ 97-41-17. Poisons; administering to animals.

Every person who shall willfully and unlawfully administer any poison to any horse, mare, colt, mule, jack, jennet, cattle, deer, dog, cat, hog, sheep, chicken, duck, goose, turkey, pea-fowl, guinea-fowl, or partridge, or shall maliciously expose any poison substance with intent that the same should be taken or swallowed by any horse, mare, colt, mule, jack, jennet, cattle, dog, cat, hog, sheep, chicken, duck, goose, turkey, pea-fowl, guinea-fowl, or partridge, shall, upon conviction, be punished by imprisonment in the Penitentiary not exceeding three (3) years, or in the county jail not exceeding one (1) year, and by a fine not exceeding Five Hundred Dollars (\$500.00).

SOURCES: Codes, Hutchinson's 848, ch. 64, art. 12, Title 7(13); 1857, ch. 64, art. 215; 1871, § 2671; 1880, § 2938; 1892, § 1256; 1906, § 1332; Hemingway's 1917, § 1065; 1930, § 1096; 1942, § 2329; Laws, 2011, ch. 536, § 7, eff from and after passage (approved Apr. 26, 2011.)

Amendment Notes — The 2011 amendment inserted “cat” following “dog” twice in the section.

§ 97-41-18. Prohibition against intentionally conducting fight between canine and hog; exceptions; penalties.

(1) For the purposes of this section, “hog” means a pig, swine or boar.

(2) It is unlawful for any person to organize or conduct any commercial event commonly referred to as a “catch” wherein there is a display of combat or fighting among one or more domestic or feral canines and feral or domestic hogs and in which it is intended or reasonably foreseeable that the canines or hogs would be injured, maimed, mutilated or killed.

(3) It is unlawful for any person to organize, conduct or financially or materially support any event prohibited by this section.

(4) The provisions of this section shall not apply to any competitive event in which canines trained for hunting or herding activities are released in an open or enclosed area to locate and corner hogs, commonly referred to as a “bay event,” and in which competitive points are deducted if a hog is caught and held.

(5) The provisions of this section shall not apply to the lawful hunting of hogs with canines or the use of canines for the management, farming or herding of hogs which are livestock or the private training of canines for the purposes enumerated in this subsection provided that such training is conducted for the field using accepted dog handling and training practices and is not in violation of the provisions of subsection (1) of this section.

(6) Any person convicted under the provisions of this section shall be fined not more than One Thousand Dollars (\$1,000.00), imprisoned for not more than six (6) months, or both.

SOURCES: Laws, 2006, ch. 491, § 2; Laws, 2008, ch. 387, § 1; Laws, 2012, ch. 421, § 1, eff from and after passage (approved Apr. 18, 2012.)

Amendment Notes — The 2008 amendment extended the date of the repealer in (7) by substituting “July 1, 2012” for “July 1, 2008.”

The 2012 amendment deleted former (7) which read: “This section shall stand repealed on July 1, 2012.”

ATTORNEY GENERAL OPINIONS

Interpretation of the phrase “commercial event” as an event primarily organized for the purpose of financial gain is

correct. The term would also designate an event that is advertised. Dedeaux, May 12, 2006, A.G. Op. 06-0171.

§ 97-41-21. Harassment of guide, leader, hearing, service or support dogs; penalties.

(1) An individual shall not do either of the following:

(a) Willfully and maliciously assault, beat, harass, injure, or attempt to assault, beat, harass or injure, a dog that he or she knows or has reason to believe is a guide or leader dog for a blind individual, a hearing dog for a deaf or audibly impaired individual, a service dog for a physically limited individual, or a support dog for a mobility impaired person as described in Sections 43-6-151 through 43-6-155.

(b) Willfully and maliciously impede or interfere with, or attempt to impede or interfere with, duties performed by a dog that he or she knows or has reason to believe is a guide or leader dog for a blind individual, a hearing dog for a deaf or audibly impaired individual, a service dog for a physically limited individual, or a support dog for a mobility impaired person as described in Sections 43-6-151 through 43-6-155.

(2) An individual who violates subsection (1) is guilty of a misdemeanor punishable by imprisonment for not more than ninety (90) days or a fine of not more than Five Hundred Dollars (\$500.00), or both.

(3) In a prosecution for a violation of subsection (1), evidence that the defendant initiated or continued conduct directed toward a dog described in subsection (1) after being requested to avoid or discontinue that conduct or similar conduct by a blind, deaf, audibly impaired, physically limited or mobility impaired individual being served or assisted by the dog shall give rise to a rebuttable presumption that the conduct was initiated or continued maliciously.

(4) A conviction and imposition of a sentence under this section does not prevent a conviction and imposition of a sentence under Section 97-41-16 pertaining to the offenses of simple or aggravated cruelty to a dog or cat, or any other applicable provision of law.

(5) As used in this section:

(a) "Audibly impaired" means the inability to hear air conduction thresholds at an average of forty (40) decibels or greater in the individual's better ear.

(b) "Blind" means having a visual acuity of 20/200 or less in the individual's better eye with correction, or having a limitation of the individual's field of vision such that the widest diameter of the visual field subtends an angular distance not greater than twenty (20) degrees.

(c) "Deaf" means the individual's hearing is totally impaired or the individual's hearing, with or without amplification, is so seriously impaired that the primary means of receiving spoken language is through other sensory input, including, but not limited to, lip reading, sign language, finger spelling or reading.

(d) "Harass" means to engage in any conduct directed toward a guide, leader, hearing or service dog that is likely to impede or interfere with the dog's performance of its duties or that places the blind, deaf, audibly

impaired or physically limited individual being served or assisted by the dog in danger of injury.

(e) “Injure” means to cause any physical injury to a dog described in subsection (1).

(f) “Maliciously” means any of the following:

(i) With intent to assault, beat, harass or injure a dog described in subsection (1).

(ii) With intent to impede or interfere with duties performed by a dog described in subsection (1).

(iii) With intent to disturb, endanger or cause emotional distress to a blind, deaf, audibly impaired or physically limited individual being served or assisted by a dog described in subsection (1).

(iv) With knowledge that the individual’s conduct will, or is likely to, harass or injure a dog described in subsection (1).

(v) With knowledge that the individual’s conduct will, or is likely to, impede or interfere with duties performed by a dog described in subsection (1).

(vi) With knowledge that the individual’s conduct will, or is likely to, disturb, endanger or cause emotional distress to a blind, deaf, audibly impaired or physically limited individual being served or assisted by a dog described in subsection (1).

(g) “Physically limited” means having limited ambulatory abilities and includes, but is not limited to, having a temporary or permanent impairment or condition that does one or more of the following:

(i) Causes the individual to use a wheelchair or walk with difficulty or insecurity.

(ii) Affects sight or hearing to the extent that an individual is insecure or exposed to danger.

(iii) Causes faulty coordination.

(iv) Reduces mobility, flexibility, coordination or perceptiveness.

SOURCES: Laws, 1997, ch. 426, § 1; Laws, 2011, ch. 536, § 8, eff from and after passage (approved Apr. 26, 2011.)

Amendment Notes — The 2011 amendment rewrote (1)(a) and (b), inserted “or mobility impaired” in (3); and rewrote (4).

§ 97-41-23. Injury and killing of public service animals; penalties.

(1) It is unlawful for any person to willfully and maliciously taunt, torment, tease, beat, strike, or to administer, expose or inject any desensitizing drugs, chemicals or substance to any public service animal. Any person who violates this section is guilty of a misdemeanor, and upon conviction thereof shall be fined not more than Two Hundred Dollars (\$200.00) and be imprisoned not more than five (5) days, or both.

(2) Any person who, without just cause, purposely kills or injures any public service animal is guilty of a felony and upon conviction shall be fined not more than Five Thousand Dollars (\$5,000.00) and be imprisoned not more than five (5) years, or both.

(3) For purposes of this section, the term “public service animal” means any animal trained and used to assist a law enforcement agency, public safety entity or search and rescue agency.

(4) A conviction and imposition of a sentence under this section does not prevent a conviction and imposition of a sentence under Section 97-41-16 pertaining to the offenses of simple or aggravated cruelty to a dog or cat, or under any other applicable provision of law.

(5) Any person guilty of violating subsection (2) of this section shall also be required to make restitution to the law enforcement agency or owner aggrieved thereby.

(6) The provisions of this section shall not apply to the lawful practice of veterinary medicine.

SOURCES: Laws, 2003, ch. 498, § 1; Laws, 2011, ch. 536, § 9, eff from and after passage (approved Apr. 26, 2011.)

Amendment Notes — The 2011 amendment added (4) and redesignated the remaining subsections accordingly.

CHAPTER 43

Racketeer Influenced and Corrupt Organization Act (RICO)

§ 97-43-11. Seizure and forfeiture of property; procedures.

Editor’s Note — Section 27-3-4 provides that the terms “Mississippi State Tax Commission,” “State Tax Commission,” “Tax Commission” and “commission” appearing in the laws of this state in connection with the performance of the duties and functions by the Mississippi State Tax Commission, the State Tax Commission or Tax Commission shall mean the Department of Revenue.”

CHAPTER 45

Computer Crimes and Identity Theft

SEC.

97-45-33. Online impersonation; penalties.

§ 97-45-33. Online impersonation; penalties.

(1) Notwithstanding any other provision of law, any person who knowingly and without consent impersonates another actual person through or on an Internet website or by other electronic means for purposes of harming, intimidating, threatening or defrauding another person is guilty of a misdemeanor.

(2) For purposes of this section, an impersonation is credible if another person would reasonably believe, or did reasonably believe, that the defendant was or is the person who was impersonated.

(3) For purposes of this section, “electronic means” shall include opening an email account or an account or profile on a social networking Internet website in another person’s name.

(4) A violation of this section is punishable by a fine of not less than Two Hundred Fifty Dollars (\$250.00) and not exceeding One Thousand Dollars (\$1,000.00) or by imprisonment for not less than ten (10) days and not more than one (1) year, or both.

(5) This section shall not preclude prosecution under any other provision of law and shall be considered supplemental thereto.

SOURCES: Laws, 2011, ch. 340, § 1, eff from and after July 1, 2011.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

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